EXHIBIT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas	)	WC Docket No. 06-172

OPPOSITION TO VERIZON'S PETITIONS

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Talk America Holdings, Inc.;
TDS Metrocom, LLC; and
U.S. Telepacific Corp. d/b/a Telepacific Communications

March 5, 2007

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SUMMARY

Verizon has failed to make a prima facie case under § 10 for forbearance relief from § 251(c)(3) loop and transport unbundling in the six MSAs associated with its Petitions. To obtain relief, Verizon must demonstrate that *all* of the three prongs of the § 10(a) standard are satisfied. In particular, the Commission must find forbearance would be in the public interest, and must consider whether forbearance "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services." Verizon's Petitions, however, fail to make this showing. Not once does Verizon claim that that the unbundling relief it seeks will "promote competitive market conditions" or "enhance competition." Nor could Verizon make such claims, since (1) Verizon remains the dominant provider of residential and business telecommunications services in each of the six MSAs despite the market opening provisions of the Act and (2) many of the competitors it faces in the six MSAs rely upon Verizon's bottleneck wholesale loop and transport facilities to compete. For this reason alone, unbundling forbearance is not justified.

In any event, the Commission previously found in the *TRO* and *TRRO* that competitors are "impaired" without access to stand alone copper loops nationwide, and without access to high-capacity loop and transport UNEs in the overwhelming majority of the wire centers in the nation. The Commission has therefore *already* concluded that the unbundling relief Verizon seeks through its Petitions would impair, not enhance, competition among providers of telecommunications services.

If Verizon's request were granted, Verizon would face *less* competition than it does now. Verizon does not even try to explain how less competition will benefit consumers. For the

Commission to make such a finding would be inconsistent with the core objective of the Act to "uproot[]" local telephone company "monopolies" and "reorganize" monopoly markets into fully competitive ones. This has yet to occur.

Verizon also cannot show that Section 251(c)(3) loop and transport unbundling is no longer necessary to ensure that charges and practices are just, reasonable, and non-discriminatory. As a threshold matter, Verizon improperly seeks unbundling forbearance on an MSA-wide rather than on a wire center basis as the *Omaha* and *ACS Orders* require. Further, Verizon has not demonstrated the actual geographic extent of competitive wireline facilities throughout the MSAs or the availability of mass market and enterprise market services over such facilities, so it would be impossible for the Commission to make a finding as to whether the § 10(a) standard was actually satisfied throughout each of the MSAs. Verizon's Petitions provide nothing more than a dizzying blizzard of irrelevant statistics that offer no evidence of actual and successful competition in its local markets that erode or discipline Verizon's substantial market power over loop and transport facilities.

Another flaw lies in Verizon's over-reliance on the presence of competing wireline fiber providers in a certain percentage of wire centers in each of the MSAs. While the Commission never considered this approach in the *Omaha* and *ACS Orders*, this argument does not advance Verizon's case because the presence of fiber-based collocation is an inaccurate predictor of facilities-based competition.

Nor does Verizon's claim that its market share for *retail voice services* is declining provide sufficient basis for unbundling relief. Competitors rely heavily on these § 251(c)(3) facilities for far more than voice services, including high speed broadband access, Ethernet, and IPTV.

Even if the market for voice services were as competitive as Verizon alleges, eliminating unbundling would still impair competition for many advanced telecommunications capabilities and diminish competition in multichannel video services.

The availability of Verizon's special access, section 271, and resale offerings similarly is insufficient to safeguard competition. Its unregulated special access and section 271 rates are already at above-market levels and resale rates were not designed to promote efficient and meaningful competitive entry. Furthermore, contrary to Verizon's claims, over-the-top VoIP and wireless services are not substitutes to § 251(c)(3) loop and transport facilities. The Commission has rejected such arguments in the *Omaha* and *ACS Orders* and should do so again. Further, because Verizon presents no arguments to support forbearance with respect to inside wire subloops, the Commission should deny this request as it did in the *ACS Order*.

Verizon also fails to satisfy the Section 10(a)(2) standard. This subsection requires that the Commission can only grant a forbearance request if the petitioner shows that enforcement of the regulation "is not necessary for the protection of consumers." As explained above, the continued availability of § 251(c)(3) loop and transport facilities in each MSA at issue remains necessary to promote and protect competition in these markets, and to ensure customers in each of them have, and continue to have, competitive choices. Consumers would be harmed by eliminating unbundling requirements because competitors that rely on UNEs would be forced to pay excessive special access rates instead of TELRIC-based rates and, as a result, the prices for competitive services would increase.

Verizon's Petitions rely heavily on analysis purportedly consistent with the Commission's analysis in the *Omaha Order*. It claims that "[c]ompetition in [each of the six MSAs] is more advanced than it was in the Omaha MSA … [and] the Commission should accordingly find that the first two prongs of the forbearance test are satisfied and grant Verizon substantially the same relief that is granted in the *Omaha Forbearance Order.*" However, as discussed herein, the *Omaha Order*'s analysis in granting Qwest's request for forbearance from § 251(c)(3) loop and transport unbundling, which the *ACS Order* applied, was flawed in many respects. The Commission should not exacerbate its error by granting Verizon's Petition for § 251(c)(3) unbundling relief on those grounds.

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OPPOSITION TO VERIZON'S PETITIONS

The undersigned parties (collectively referred to as "Opponents"), by their counsel, respectfully submit this opposition in the above-captioned proceeding as it pertains to Verizon's Petitions for forbearance from its obligation to provision § 251(c)(3) loop and transport unbundled network elements ("UNEs") throughout the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Serving Areas ("MSAs").[1] For the reasons ex-

[1] The undersigned parties specifically oppose Verizon's request for forbearance from its obligation to offer § 251(c)(3) loop and transport facilities pursuant to 47 C.F.R. § 51.319(a), (b), and (e). At this time, Opponents take no position on Verizon's request for forbearance from "dominant carrier regulation for switched access service," *see, e.g.,* Verizon Boston Petition at 29, which it defined as including relief from "tariffing requirements set forth in Part 61 of the Commission's rules (47 C.F.R. §§ 61.32, 61.33, 61.38, 61.58, and 61.59); from price cap regulation set forth in Part 61 of the Commission's rules (*id.* §§ 61.41-61.49); from the Computer III requirements, including Comparably Efficient Interconnection ("CEI") and Open Network Architecture ("ONA") requirements; and from dominant carrier requirements arising under section 214 of the Act and Part 63 of the Commission's rules concerning the processes for acquiring lines, discontinuing services, assignments or transfers of control, and acquiring affiliations (*id.* §§ 63.03, 63.04, 63.60-63.66)." *See, e.g.*, Verizon Boston Petition at n.3. [Because all of Verizon's Petitions are substantially similar in format, we cite only the Boston Petition for statements that are common to all.] Verizon has not requested forbearance from regulation of interstate special access services, nor from any of its § 251(c) obligations other than providing unbundled access to loop and transport elements. Verizon's Petitions only request forbearance relief from dominant carrier regulations that apply to interstate switched access services along

plained below, Verizon has not made a *prima facie* case that it is entitled to unbundling relief, and the Commission therefore should dismiss its Petitions summarily.

I. VERIZON HAS THE BURDEN OF PROOF AS TO ALL COMPONENTS OF THE FORBEARANCE STANDARD.

Section 10(a) states that the FCC "shall forbear from applying any regulation or any provision [of the Act] ... to a telecommunications carrier or telecommunications service" if it determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations, by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[2]

In making the determination under subsection (a)(3), the FCC also must "consider whether forbearance from enforcing the provision ... will *promote competitive market conditions*, including the extent to which such forbearance will *enhance competition* among providers

with loop and transport unbundling in the six MSAs. *See e.g.*, Verizon Boston Petition, at 24-27. To the extent that the Commission grants any forbearance relief in this docket, it should state expressly that the relief does not apply to special access or to § 251(c) obligations not specified in the Petitions, because Verizon did not expressly request such relief. *See Omaha Order*, ¶¶ 16 & 111 (denying aspects of Qwest's forbearance request because Qwest failed to explain why forbearance was warranted).

[2] 47 U.S.C. § 160(a)(1)-(3).

of telecommunications services."[3] All three prongs of this standard must be afforded a plain meaning interpretation[4] and must be satisfied before the Commission grants a petition for forbearance. The prongs "are conjunctive," meaning that "'[t]he Commission could properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.'"[5]

As the petitioner, Verizon has the burden of proof in this proceeding and must demonstrate that its forbearance request fully satisfies the statutory standards. The Commission has explained that in "pursuing relief through the vehicle of forbearance ... the Petitioner [has] the obligation to provide evidence demonstrating with specificity why [it] should receive relief under the applicable substantive standards."[6] A petitioner must present a detailed showing of the services and facilities it seeks forbearance for and the statutory and regulatory provisions from

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[3] *Id.* §160(b) (emphasis added); *see also AT&T v. FCC*, 452 F.3d 830 (D.C. Cir. 2006) (quoting same).

[4] *AT&T v. FCC*, 452 F.3d at 836 (rejecting the Commission's "new rule" that "conflicts with the statute's plain meaning").

[5] *In re Core Commu'ns., Inc.*, 455 F.3d 267 (D.C. Cir. 2006), *quoting Cellular Telecomms. & Internet Ass'n v FCC*, 330 F.3d 502, 509 (D.C. Cir. 2001).

[6] *Petition for Forbearance From E911 Accuracy Standards Imposed On Tier III Carriers For Locating Wireless Subscribers Under Rule Section 20.18(h),* 18 FCC Rcd. 24648, 24658 ¶ 24 (2003) (rejecting claim that petitioners' burden in a forbearance petition is "lower" than the burden applicable in a waiver petition); *See also Core*, 455 F.3d at 279 (stating that the FCC found that the Petitioner provided "no evidence" in support of arguments for forbearance); *Policy and Rules Concerning the Interstate Interexchange Marketplace*, 14 FCC Rcd. 391, 405 ¶ 28 (1998) (denying forbearance because "petitioners have not met their burden with respect to the first and second prongs of the forbearance standard."); *Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934 as Amended*, 15 FCC Rcd 7066, 7070 ¶ 7 (petitioner "must explain" benefits of forbearance).

which it seeks forbearance.[7] In this connection, as already pointed out to the Commission, Verizon has not met this burden because, among other things, it has failed to disclose the proposed terms and conditions on which it would provide wholesale access absent UNE obligations.[8] Verizon's claim that it would offer wholesale access on reasonable terms and conditions is entitled to no weight, and has no credibility, absent disclosure of proposed agreements for wholesale access.

II. FORBEARANCE FROM UNBUNDLING IS INCONSISTENT WITH THE OBJECTIVES OF THE ACT

In *Verizon v. FCC*, 535 U.S. 467, 488 (2002), the Supreme Court stated that the Section 251(c)(3) unbundling provisions of the Act were designed "to achieve the entirely new objective of uprooting the monopolies." It even quoted a leading backer of the Act in the Senate and stated:

> This is extraordinary in the sense of telling private industry that this is what they have to do in order to let the competitors come in and try to beat your economic brains out .... It is kind of almost a jump-start .... I will do everything I have to let you into my business, because we used to be a bottleneck; we used to be a monopoly; we used to control everything. Now, this legislation says you will not control much of anything. You will have to allow for nondiscriminatory access on an unbundled basis to the network functions and services of the Bell operating companies network that is

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[7] *Omaha Order*, ¶ 16 (rejecting forbearance request because the Petitioner failed to identify specific regulations or to explain how they meet certain section 10 criteria).

[8] *See* Letter from Patrick Donovan, Counsel for Cavalier Telephone, LLC, Bingham McCutchen, LLP, to Marlene H. Dortch, Secretary, FCC, WC Doc. No. 06-172 (Sep. 29, 2006).

> at least equal in type, quality, and price to the access [a] Bell operating company affords to itself.[9]

The Court emphasized that "[f]or the first time, Congress passed a statute ....with the aim not just to balance interests between sellers and buyers, but to reorganize markets by rendering regulated utilities' monopolies vulnerable to interlopers, even if that meant swallowing the traditional federal reluctance to intrude into local telephone markets" and "give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property."[10]

A. Verizon is the Dominant Provider of Telecommunications Services in the Six MSAs

In the *Omaha* and *ACS Orders*, the Commission granted loop and transport unbundling forbearance because it ostensibly believed these objectives of the Act were satisfied in certain wire centers. Before it even commenced a granular wire center analysis to determine if forbearance was warranted, the Commission found there was substantial evidence of "robust"[11] competition in the residential and business retail markets of the MSAs under consideration and that competitors were competing "very successfully using [their] own network to provide services in the mass market where revenue potential, compared with the enterprise market, is relatively low."[12]

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[9] *Verizon*, 535 U.S. at 488-89 (quoting and citing Cong. Rec. 15572 (1995) (Remarks of Sen. Breaux (La.) on Pub. L. 104-104 (1995))).

[10] *Verizon*, 535 U.S. at 489.

[11] *ACS Order*, ¶ 28.

[12] *Omaha Order*, ¶ 66.

The situation in the six MSAs at issue here is very different, and substantial evidence prevents the Commission from making a similar finding. Despite the Commission's efforts to promote effective competition as Section 251(c)(3) of the Act, Congress and the Supreme Court envisioned, Verizon retains its stranglehold over the marketplace and remains the dominant[13] provider of residential and business telecommunications services in each of the six MSAs at issue. Contrary to Verizon's claims, evidence reveals its continuing dominant status in each of these markets. Indeed, even the misappropriated E911 data Verizon submits, which provides an independent basis to dismiss and deny the Petitions,[14] indicates that Verizon serves **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL] in each of the MSAs.[15] Publicly available statewide

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[13] Verizon is dominant in these markets unless the Commission determines otherwise and it would not be possible for the Commission to come to this conclusion in light of the market share data discussed below.

[14] *See* Letter from Andrew Lipman *et al.*, Counsel for ACN Communication Services, Inc. et al., to Marlene H. Dortch, Secretary FCC, WC Docket No. 06-172 (filed Oct. 16, 2006) (Motion to Dismiss); *see also* Letter from J.G. Harrington and Jason E. Rademacher, Dow-Lohnes, Counsel for Cox Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket 06-172 (filed Jan. 12, 2007).

[15] Verizon admits on the face of its Petitions that it remains the dominant provider of residential telephone service based on its own data. Specifically, Verizon's Petitions allege that *all competitors combined* provide service only to approximately **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** of the residential lines in Verizon's service area in the Boston, New York, Philadelphia, Pittsburgh, Rhode Island and Virginia Beach MSAs, respectively. Verizon's percentages are based on total of the cable E911 data, Wholesale Advantage lines, CLEC resale data, and Verizon's own residential access line data. *See* Verizon Boston Petition, Attachment A (Lew/Verses/Garzillo Decl.), ¶ 7; Verizon New York Petition, Attachment A, ¶ 8; Verizon Philadelphia Petition, Attachment A, ¶ 8; Verizon Pittsburgh Petition, Attachment A, ¶ 9; Verizon Providence Petition, Attachment A, ¶ 7; Verizon Virginia Beach Petition, Attachment A, ¶ 9. Verizon's market share is therefore at least **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** of the residential lines in these MSAs, respectively. In addition, Verizon remains the dominant provider

information of Massachusetts, New York, Pennsylvania, Rhode Island and Virginia, where the major portions of the MSAs[16] at issue are located, shows that all the ILECs in these states, including Verizon, collectively remain the dominant providers of services to residential and business customers because they have 83%, 80%, 92%, 59% and 82% of the residential market[17] and 66%, 64%, 62%, 54% and 73% of the business market in these states, respectively.[18]

The Commission itself recently stated that "the market share calculations indicate a high level of concentration in most franchise areas in Verizon's states"[19] and that these levels of concentration are "problematic."[20] The Department of Justice reached a similar conclusion, finding that "Verizon is the dominant provider of Local Private Lines in its franchised territory."[21] The Government Accountability Office ("GAO") also confirms this as its recent report

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of business telephone service, admitting that *all competitors combined* provide service only to approximately **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** of the switched business lines in Verizon's service area in the Boston, New York, Philadelphia, Pittsburgh, Rhode Island and Virginia Beach MSAs, respectively. *See* Verizon Boston Petition, Attachment A, ¶ 41; Verizon New York Petition, Attachment A, ¶ 47; Verizon Philadelphia Petition, Attachment A, ¶ 43; Verizon Pittsburgh Petition, Attachment A, ¶ 37; Verizon Providence Petition, Attachment A, ¶ 39; Verizon Virginia Beach Petition, Attachment A, ¶ 38. Verizon's market share is therefore at least **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** of the of the switched business lines in these MSAs, respectively.

16 Some of the MSAs include geographic regions outside of these states.

17 *See Local Telephone Competition: Status as of June 30, 2006* at Tables 10-12. Table 1 provided in Exhibit A attached hereto illustrates how these percentages were derived.

18 *See Local Telephone Competition: Status as of June 30, 2006* at Tables 10-12. Table 2 provided in Exhibit A attached hereto illustrates how these percentages were derived.

19 *Verizon/MCI Order*, ¶ 103.

20 *Verizon/MCI Order*, ¶ 103.

21 *DOJ Impact Statement*, at 6.

concludes that competitors have facilities to and are serving "relatively small subset of buildings."[22] The GAO found on average that competitive facilities are present in "less than 6 percent of buildings with at least a DS-1 level of demand" and approximately 15 percent of buildings with a DS-3 level of demand.[23] GAO also found that rates for special access services have increased where they are not regulated, which demonstrates the lack of facilities-based competitive alternatives otherwise needed to constrain such price increases.[24] Significantly, the GAO's Report was based, in part, on the status of competition in the New York, Pittsburgh and Virginia Beach MSAs, which are three of the six MSAs at issue here.[25]

Tellingly, Verizon's sanguine outlook in its Petitions of the extent of competitive high capacity loop and transport alternatives in the six MSAs directly conflicts with the Commission's, the Department of Justice's, and the GAO's conclusions that such alternatives are the exception rather than the rule. The Justice Department specifically found that for "the vast majority of commercial buildings in its territory, Verizon is the only carrier that owns a last-mile connection to the building."[26] It further explained that because Verizon controls the vast majority of last mile connections, "competing carriers typically must lease the connection from Verizon" in order to serve customers in those buildings.[27] Thus, it concluded that competition was insuffi-

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[22] *See* GAO Report at 12.

[23] *See* GAO Report at 12.

[24] *See* GAO Report at 12-13.

[25] *See* GAO Report at 20.

[26] *DOJ Impact Statement*, at 6 .

[27] *Id.*

cient to discipline Verizon's substantial market power because, while "competitors might resell Local Private Lines from Verizon, those competitors would not be as effective a competitive constraint because Verizon would control the price of the resold circuits," and would "have the ability to raise price to retail and wholesale customers of Local Private Lines."[28] As noted above, the GAO Report recognized this but on a more generalized basis.

B. Competitors Rely Heavily on the Availability of Verizon's Loop and Transport Offerings to Compete

Even Verizon readily admits that many of the competitors it faces in the six MSAs rely upon its wholesale offerings.[29] This is quite different from the facts encountered by the Commission in Omaha and Anchorage, as the principal competitors in each of those markets operated over their own facilities. The Commission found in the *TRRO* that CLECs are "impaired" without access to unbundled network elements, except with respect to DS1 and higher loops and transport if the wire center loop and transport non-impairment thresholds are met.[30] Nor has the Commission found *any* circumstance in which CLECs would not be impaired if denied access to stand alone copper loops. The Commission has therefore *already* concluded that the unbundling relief Verizon seeks through its Petitions would impair competition among providers of telecommunications services.

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[28] *Id.* at 7.

[29] *See, e.g.*, Verizon Boston Petition at 14 (discussing the competitors that reply on Verizon's Wholesale Advantage service), at 24 (discussing carriers that reply on Verizon's special access services).

[30] *TRRO*, ¶¶ 66 & 146.

Publicly available data confirms that competitors remain heavily reliant on UNEs to compete and that competition would be impaired if UNEs were not available. While Verizon failed to disclose the specific number of § 251(c)(3) loop and transport UNEs it provisions on a wholesale basis to CLECs in each of the MSAs, the Commission's Local Telephone Competition: Status as of June 30, 2006 report indicates that CLECs in Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island and Virginia rely on UNE loops 28%, 31%, 31%, 44%, 17% and 29% of the time to provision services, respectively.[31] This report also shows that in Massachusetts, New Jersey, New York, Pennsylvania, and Virginia CLEC-owned loops are provisioned only 41%, 12%, 32%, 32%, and 44% of the time, respectively.[32] Even though this data is not broken down by MSAs, it reveals the significant role UNEs play in the provision of competitive services in each of the states that would be most affected by Verizon's Petitions.[33]

Verizon likely failed to disclose MSA specific loop and transport UNE data because, as the statewide information generally reveals, "primary competitor[s] use[] unbundled network elements (UNEs), particularly unbundled loops, as [a] primary vehicle for serving and acquiring customers."[34] The legal presumption is that such evidence would undercut the very basis for Verizon's unbundling forbearance request.[35] The Commission should therefore deny Verizon's

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[31] *See Local Telephone Competition: Status as of June 30, 2006* at Table 11.

[32] *Id.*

[33] As noted above, some of the MSAs include geographic regions outside of these states.

[34] *Omaha Order*, at n.4.

[35] *International Union, UAW v. National Labor Relations Board*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) (when a party has knowledge of evidence that is within the party's control and

forbearance request on these grounds and should explain that granting "forbearance from application of section 251(c)(3) on the basis of competition that exists only due to section 251(c)(3) would undercut the very competition being used to justify the forbearance."[36]

III. VERIZON CANNOT DEMONSTRATE THAT UNBUNDLING FORBEARANCE WOULD PROMOTE OR ENHANCE COMPETITION

Should Commission nevertheless proceed in applying the three prong forbearance analysis despite the presumption and before granting any forbearance request, it must, as Section 10(b) requires determine that such relief "will promote competitive market conditions" and explain "the extent to which such forbearance will enhance competition among providers of telecommunications services."[37] Verizon's Petitions, however, are entirely devoid of such a showing. Not once does Verizon claim that that the unbundling relief it seeks will "promote competitive market conditions." The words "enhanced competition" literally do not appear anywhere in the Petitions.

Nor could Verizon plausibly demonstrate that this would occur. As discussed above, retail competition in the six MSAs is limited and most competitors rely heavily on the availability of Verizon's loop and transport UNE offerings to compete. Therefore, unbundling forbearance would not "promote" or "enhance" competitive market conditions as the Act requires but rather hinder or destroy it. Accordingly, Verizon would face far less competition from these carriers if

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fails to produce it, the legal presumption is that the evidence is unfavorable to the party's position).

[36] *Omaha Order*, ¶ 68 n.185.

[37] *See* 47 U.S.C. § 160(b).

the relief it seeks were granted, especially (but not only) in wire centers that do not satisfy the *TRRO's* non-impairment thresholds. Not surprisingly, Verizon makes no effort to explain how *less* competition would benefit consumers.

Given Verizon's market dominance, any argument that the elimination of § 251(c)(3) loop and transport unbundling throughout the six MSAs would somehow "promote" pure facilities-based competition throughout them flunks basic economics. The elimination of high-capacity loop and transport UNEs and the deregulation of special access pricing in metropolitan markets will not spur investment in competitive facilities. Competitors "may find it uneconomical to extend their own networks to end users if demand for dedicated access is relatively low."[38] As the GAO recently concluded, "a variety of factors" make pure facilities-based competitive entry uneconomic including,

> the high sunk costs—that is, costs that once incurred cannot be readily recovered—of constructing local networks, the cost of local government regulations, and limited access to buildings. All of these factors can increase competitors' cost to deploy facilities and provide dedicated access services to locations within an MSA. Constructing a local telecommunications network is extremely capital intensive. Most communications equipment has no other use and therefore can not be reused for alternative purposes. Because these investments would have virtually no alternative value if the business fails, competitors must have a certain level of expected revenue to extend their networks.[39]

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[38] GAO Report at 13.

[39] GAO Report at 26.

Absent such "expected revenues," facilities-based competitive entry makes no economic sense. The Commission recognized this in the *TRO* and *TRRO*.[40] Even assuming *arguendo* that there are some limited geographic areas in which demand is sufficiently concentrated to justify competitive investment, no credible argument could be made that Section 10(b) supports the unbundling relief Verizon seeks *everywhere* in the six MSAs.

As the Commission has repeatedly held, Verizon's market power must be disciplined through § 251(c)(3) loop and transport unbundling. To the extent competition has developed to any extent in the local exchange market, it has been "enabled by, the availability of [loop and transport] UNEs"[41] and any elimination of them "to customers using tariffed alternatives might preclude competition using those tariffed services."[42] Any deviation by the Commission from these sound conclusions would be improper here, especially since Verizon remains the dominant provider of residential and business telecommunications services throughout each of the six MSAs and has not specifically demonstrated how the elimination of these UNEs will "enhance" and "promote" competition throughout these MSAs as Section 10(b) requires.[43]

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[40] *TRO*, ¶ 237 (recognizing the large and fixed sunk costs and explaining that "a carrier will not deploy mass market loops unless it knows in advance that it will have customers that will generate sufficient revenues to allow it to recover its sunk loop investment."), ¶ 303; *TRRO*, ¶¶ 111 & 167 (establishing loop and transport non-impairment wire center thresholds to identify where sufficient revenue opportunities out of a wire center exist to justify deployment of facilities in an economic manner).

[41] *TRRO*, ¶ 38.

[42] *TRRO*, ¶ 65 ("elimination of UNEs would significantly risk increased special access pricing, undermining or destroying the ability to compete using tariffed alternatives").

[43] See 47 U.S.C. § 160(b).

IV. VERIZON CANNOT DEMONSTRATE THAT ITS CHARGES WOULD REMAIN JUST, REASONABLE AND NONDISCRIMINATORY IF UNBUNDLING FORBEARANCE WERE GRANTED

Pursuant to Section 10(a)(1), forbearance is only appropriate if the petitioner can demonstrate that a regulation or provision of the Act is no longer "necessary to ensure that the charges ... for [its] ... telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory." Verizon claims it faces so much competition throughout the six MSAs that the offering of loop and transport UNEs is no longer necessary to discipline its pricing, but it fails to make a plausible case for this claim, even under the liberal standard applied by the Commission in past decisions.

To justify unbundling forbearance under Section 10(a)(1), the *Omaha Order* establishes that Verizon must show (a) the existence of actual successful competition in specific wire centers, including a showing that competitors have extensive facilities to end users (which meet a certain wire center coverage threshold percentage) capable of delivering both mass market and enterprise telecommunications, and (b) that competitors were in fact using such facilities to compete with the ILEC.[44] Although Opponents believe the *Omaha Order* was erroneous, as explained in Section VII below, and that the Commission should revisit the standard applied in that case, Verizon has failed to demonstrate that it is entitled to forbearance even under that flawed precedent.

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[44] *Omaha Order*, ¶¶ 62 n.156, 65-66, 69. The Commission applied the same analytical framework in the *ACS Order*. *See ACS Order*, ¶¶ 9 & 32.

A. Verizon Improperly Seeks Forbearance on an MSA-Wide Rather Than a Wire Center Basis

Although Verizon claims its Petitions meet the standards set by the *Omaha Order*, the Commission there *denied* Qwest's request for forbearance from § 251(c)(3) loop and transport unbundling obligations throughout an entire MSA,[45] the relief Verizon seeks here. It found that the evidence Qwest presented in its Petition only warranted forbearance "in locations where Qwest faces sufficient facilities-based competition to ensure that the interests of consumers and the goals of the Act are protected under the standards of section 10(a)[,]"[46] and therefore only granted forbearance as to particular wire centers where competitors had voice enabled facilities coverage to a threshold percentage of end users in each wire center.[47]

Ignoring the requirements of the *Omaha Order*, Verizon does not provide any analysis of the level of competition on a wire center basis. Nor does it provide the actual geographic locations of loop and transport facilities competitors have deployed by wire center or evidence that competitors have facilities coverage to the threshold percentage of end users in each of the wire

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[45] *Omaha Order*, ¶ 61; *see also ACS Order,* ¶ 15 (rejecting "ACS's request that the Commission consider the entire Anchorage study area as the relevant geographic market").

[46] *Omaha Order*, ¶ 61.

[47] In the *Omaha Order*, the Commission granted "Qwest forbearance from obligations to unbundled loops and transport pursuant to section 251(c)(3) in wire centers where Cox's voice-enable cable plan covers at least" a certain percent of "end user locations that are accessible from that wire center." *See Omaha Order*, ¶ 62. Likewise, in the *ACS Order*, the Commission gave significant weight to the fact that in the 5 wire centers where it granted forbearance, GCI had "voice-enabled cable plant" to more than a certain percent of "the end user locations that are accessible from those wire centers." *ACS Order*, ¶¶ 21.

centers in each of the six MSAs.[48] The Commission therefore should summarily deny Verizon's Petitions as to unbundling relief, especially since the Commission is "under no statutory obligation to evaluate [a] Petition other than as pled."[49] While "sections 10(a) and 10(c) each provide … sufficient authority to grant [a] Petition in part — that is, [with respect to 251(c)(3) loop and transport forbearance requests] only in certain wire centers,"[50] the Commission will exercise this authority only when the Petitioner provides evidence on a wire center basis in the Petition.[51] Verizon has not, which is fatal to its request.[52]

The Commission has already "considered and rejected the idea of measuring facilities-based coverage on an MSA basis" in this context, and found that "[u]sing such a broad geographic region would not allow [the Commission] to determine precisely where facilities-based competition exists, which are the only locations in which we have determined that the forbearance criteria of section 10(a) are satisfied with respect to section 251(c)(3) unbundling obliga-

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48 In its Petitions, Verizon provides maps to show the extent of competitive cable and CLEC facilities throughout each of the MSAs, *see, e.g.*, Verizon Boston Petition, Attachment 1, Exhibits 3, 5, & 6; however, Verizon does not break down the information on a wire center basis nor does it provide the extent of actual competitive facilities *to end users* in each of the wire centers.

49 *Omaha Order*, n.161.

50 *Omaha Order*, n.161 (citing 47 U.S.C. § 160(a) (granting the Commission forbearance authority independent of a filed petition), (c) (authorizing the Commission to grant to grant or deny a forbearance petition in whole or in part)).

51 *Omaha Order*, n.186.

52 Verizon asserts that it did not provide information on a wire center basis and used E911 listings because it has "no way to discern exactly where its facilities based competitors are capable of providing service." Verizon Boston Petition at n.6. Verizon's claims ring hollow. The E911 data of the competitors it references throughout its Petitions includes street addresses that are associated with particular wire centers.

tions."[53] Forbearance from these obligations would only be appropriate "when the evidence … *is presented* on a basis that allows [the Commission], *in an administrable fashion and consistent with the Commission's precedent*, to make findings on a wire center basis"[54] as it did in the *TRRO*.[55] Given Verizon's failure to make such a showing here, its request for forbearance from § 251(c)(3) loop and transport unbundling should be rejected by the Commission on this basis alone.

B. Verizon Has Not Demonstrated that Wireline Competitors Actually Have Their Own Facilities Available Ubiquitously Throughout the Entire MSA and Actually Offer Services Over Them to Both Mass and Enterprise Market End Users.

Verizon implicitly claims that it faces so much competition in the six MSAs that it is essentially a non-dominant provider of loop and transport capacity in these markets. However, as demonstrated above, Verizon actually remains the dominant telecommunication service provider and has a stranglehold over these ubiquitous bottleneck loop and transport facilities in all six MSAs. The CLEC competitors cited by Verizon do not alter this fact. They primarily exist and were able to enter these MSAs because Verizon had to make these facilities available to them on a nondiscriminatory, unbundled basis under section 251(c)(3). Verizon offers no evidence that those competitors it faces in each of the six MSAs that do rely on their own facilities rather than

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[53] *Omaha Order*, n.186; *see also ACS Order*, ¶ 15.

[54] *Omaha Order*, n.61 (emphasis added).

[55] *TRRO*, ¶ 82 (rejecting proposals that conclusions be made on an MSA basis), ¶ 87 (basing transport impairment on a wire center-based test), ¶ 155 (finding that the geographic area served by a wire center is the appropriate geographic market to determine impairment), ¶ 164 (rejecting proposals that impairment of high-capacity loops be determined based on MSAs).

Verizon's network can serve mass market and enterprise end user locations throughout each of these markets.

As shown in Section II.B, each of the six MSAs features competitors that rely heavily on Verizon's § 251(c)(3) loop and transport UNEs. For instance, CLECs rely on UNE loops 28%, 31%, 44%, and 29% of the time to compete in Massachusetts, New York, Pennsylvania and Virginia, respectively.[56] While Verizon claims it meets the same competitive standard as Qwest in Omaha, it overlooks the fact that "competition based on UNE loops and transport ma[d]e up a minor portion of the competition in the Omaha MSA," so that the Commission did not have to consider UNE-based competition in its analysis.[57] The same cannot be said about the six MSAs at issue here.

Verizon attempts to rebut this obvious point by arguing that the availability and growing market share of alternative voice services in the six MSAs justifies forbearance from obligations

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[56] *See Local Telephone Competition: Status as of June 30, 2006*, Table 11. Verizon's Petitions fail to reveal the extent of UNE demand in each of the MSAs so statewide data provided in this Commission report is provided.

[57] *Omaha Order*, ¶ 68. In the *ACS Order*, the Commission did not consider UNE-based competition because, *inter alia*, there was "*limited* retail market demand for high-capacity [DS-1 and above] telecommunications services in the Anchorage study area" and because GCI was actively migrating its existing customers to its "own last mile facilities." *ACS Order*, ¶ 36 (emphasis added) & n.84. Unlike Anchorage, there is unequivocal evidence of extensive demand for high capacity special access DS-1 and DS-3 services in these MSAs. *See, e.g.,* Verizon Boston Petitions at 24, Attachment A, ¶ 42 (showing extensive demand for such services based on voice-equivalent lines); Verizon New York Petition at 26, Attachment A ¶ 48 (same); Verizon Philadelphia Petition at 26, Attachment A ¶ 44 (same); Verizon Pittsburgh Petition at 24, Attachment A ¶ 38 (same); Verizon Providence Petition at 23, Attachment A ¶ 40 (same); Verizon Virginia Beach Petition, at 23, Attachment A ¶ 39 (same). In fact, Verizon's own estimates of demand are low because they exclude demand for DS1 and DS3 UNEs which, as discussed above, Verizon failed to include in its Petitions. Also, unlike Anchorage, there is no evidence that competitors are actively migrating all facilities purchased from Verizon to their own facilities throughout these six MSAs.

to offer § 251(c)(3) loop and transport facilities.[58] Verizon's argument is a *non sequitur*. It disregards the full range of services that CLECs provision over unbundled loop and transport facilities.[59] Voice grade services require a 64 Kbps channel and can be provisioned over numerous media, such as wireline, cable, VoIP, and wireless. In contrast, § 251(c)(3) loop and transport UNEs are wireline facilities (generally stand alone copper and/or fiber) that can be used to provision far more than 56 Kbps voice-grade services, such as high-capacity DS1 (1.544 Mbps) to DS3 (44.736 Mbps) services, broadband Internet access, and multi-channel video program services (as Cavalier intends to introduce shortly in the Virginia Beach-Norfolk market). These high-capacity services require wireline facilities and are far less competitive today than voice services.

Even assuming Verizon could properly seek forbearance from loop and transport unbundling throughout entire MSAs, it would still need to demonstrate the *actual* geographic extent of competitive wireline facilities in each MSA and the availability of mass market and enterprise market services over such facilities for the Commission to make a finding as to whether the § 10(a)(1) standard was actually satisfied throughout that MSA.[60] Verizon has failed to do even that. It relies solely on generalized claims that the mere presence of wireline competitors in the

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[58] *See, e.g.,* Verizon Boston Petition, at 16 & 23.

[59] Nor do the total number of CLEC business E911 listings in each of the six MSAs demonstrate that Verizon is a non-dominant provider of loop and transport facilities. While Verizon has not provided any backup for its tallies, a majority of the CLEC lines included in them likely include providers who resell Verizon's retail services or use Verizon's loop and transport facilities, which confirms Verizon's continuing market dominance over them.

[60] *Omaha Order*, ¶¶ 62, 66.

mass and enterprise market in the six MSAs supports unbundling forbearance. As discussed below, Verizon's assertions have no merit.

Mass Market. Instead of addressing whether competitive wireline alternatives for mass market services exists *throughout* each of the six MSAs, Verizon focuses on the *type* of competitive wireline voice services offered in them. For instance, Verizon states in each Petition that the number of retail residential switched access lines it serves has declined despite the increase in the number of households in each of the MSAs.[61] However, its access line loss percentages are invalid and overstated, because, as Verizon admits, they do not attribute MCI to Verizon.[62] In any event, this decline proves absolutely nothing because all ILECs are experiencing declining line counts and there is no evidence that the decline is a product of competitive conditions specific to the six MSAs.[63]

Verizon also asserts that cable companies in a particular MSA collectively provide voice services to residential customers in wire centers that account for some percentage of Verizon's residential access lines in the MSA.[64] However, these statistics do not specify the extent of deployment of competitive voice enabled wireline facilities in each of the wire centers or that

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61 *See, e.g.*, Verizon Boston Petition at 2 & 16.

62 *See, e.g.*, Verizon Boston Petition, Attachment A at n.2.

63 *See, e.g.*, *Local Telephone Competition: Status as of June 30, 2006* at Table 1 and 2.

64 *See, e.g.*, Verizon Boston Petition at 5.

such facilities have been deployed to more than a threshold coverage percentage[65] of end users that are accessible from each wire center in each of the MSAs.

Indeed, Verizon's statement that a certain percentage of wire centers in each MSA have competitive wireline alternatives simply proves that some other wire centers have no competitive alternatives whatsoever, but says nothing about the *extent* of competition in any wire center. For instance, Verizon does not reveal what percentage of consumers in any wire center actually have access to the competitor's wireline services. According to Verizon's dubious math, a competitive wireline service provider that has deployed wireline facilities to a single customer in a wire center would count as having service available in that wire center, even if it were uneconomical for the competitive wireline provider to deploy wireline facilities to other customers in that wire center. Thus, Verizon plainly overstates the true extent of competition.[66]

Verizon also cites the percentage of homes a cable company passes in a MSA to claim that "ubiquitous" alternative wireline facilities exist throughout it.[67] However, Verizon is unable

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[65] In the *Omaha* and *ACS* Orders, the Commission granted unbundling forbearance in wire centers where a threshold percentage was met. *See Omaha Order*, ¶¶ 62, 69; *ACS Order*, ¶ 31, 32, 38.

[66] For similar reasons, the Commission specifically rejected ACS's request for forbearance throughout its entire study area. *See ACS Order*, ¶ 15. The Commission found that GCI's competitive facilities were not "uniformly deployed throughout the Anchorage study area" and explained that "in some wire center service areas, GCI's cable plant is extensively deployed, but in other wire center service areas, GCI has few, if any, last mile cable facilities and virtually no fiber facilities." *Id.*; *see also Omaha Order*, ¶¶ 60-61 (finding that "sufficient facilities-based competition" exists in certain wire centers and not for others in the Omaha MSA). The maps attached to Verizon's Petitions **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** *See, e.g.*, Verizon Boston Petition, Attachment A at Exhibit 3, 5, and 6.

[67] *See, e.g.*, Verizon Boston Petition, at 4.

to state what percentage of these cable facilities actually support the provision of telecommunications services. It attempts to conceal this critical shortcoming by citing the cable companies' nationwide marketing statements that describe their visions of bringing competitive voice services to mass market customers nationwide,[68] and claims that cable companies are adding thousands of customers per week nationwide.[69] But these statements, even if true, are irrelevant to determining the actual percentage of mass market customers that currently can receive voice services from cable companies or otherwise have access to "voice-enabled cable plant" in each of the MSAs.[70] Nor do they reveal the number and actual location of mass market customers that have no access to these competitive alternatives.

Verizon also uses E911 data to support some of its claims, yet expressly admits that such data does not cover small business customers.[71] Therefore, there is no way to know if very small business customers, who are typically considered mass market customers by the Commission for these purposes,[72] even have access to, or are subscribing to competitive voice services from cable companies in a particular wire center or MSA.

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[68] *Id.* at 5.

[69] *See, e.g.*, Verizon Boston Petition, at 7.

[70] *See ACS Order*, ¶¶ 21, 23, & 35; *Omaha Order*, ¶ 62. Verizon offers no such detailed information or percentages in its Petitions.

[71] Verizon Boston Petition at 6.

[72] *Omaha Order*, ¶ 28 n.78.

Enterprise Market. Verizon contends that cable companies have ubiquitous cable networks throughout the six MSAs and are serving enterprise customers.[73] Yet, like its mass market claims, Verizon fails to show where the purported cable networks are in relation to the enterprise customers, or how many customers or what percentage of customers actually have access to them. Verizon cites general advertisements of the cable companies that market enterprise services in the MSAs, which only reflect a cable company's willingness to serve enterprise customers located within its limited network footprint in a particular geographic market. In fact, the websites of most cable companies afford potential customers the ability to enter a zip code to determine whether enterprise services are available.[74] Even then, the cable companies include disclaimers that not all customers/locations within that zip code are eligible to obtain their service.[75] In most cases, enterprise customers are not served by cable companies.[76]

Verizon argues that fiber route maps provided with its Petitions demonstrate that "competitive fiber reaches virtually all areas" in each of the MSAs where "enterprise customers are concentrated."[77] However, as the Commission found in the *TRRO*, such maps have "little probative value"[78] and their "value ... is undermined by several shortcomings."[79] "Due to the wide

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[73] *See, e.g.,* Verizon Boston Petition at 17.

[74] *See, e.g.,* http://www.comcast.com/business/default.html; http://www.coxbusiness.com/systems.

[75] *See, e.g.,* http://www.coxbusiness.com/systems/va_hamptonroads/ (bottom of website states "*Services and features not available in all areas.")

[76] *See TRRO*, ¶ 193.

[77] *See, e.g.*, Verizon Boston Petition at 20-21.

[78] *TRRO*, ¶ 187.

variability in market characteristics within an MSA," the Commission found that MSA-wide conclusions based on fiber deployment maps "would substantially over-predict the presence of actual deployment, as well as the potential ability to deploy."[80] Indeed, among other things, maps fail to indicate "the capacity of service ... along the competitive routes identified; if those locations require capacity only at multiple DS3 or higher capacities, and are providing revenues commensurate with those capacities."[81] In addition, maps "do not indicate whether carriers operating the fiber depicted are using these facilities to provide local service or merely interoffice transport, long-distance service, wireless service, or some combination of services other than local exchange service."[82]

C. The Presence of Collocated Fiber Providers Has Been Proven an Inaccurate Predictor of Effective Competition.

Verizon further claims that wireline competitors besides cable companies provide extensive retail competition in the enterprise market throughout the six MSAs.[83] It submits that competitors are located within wire centers where a high percentage of its retail switched business lines are located[84] (implying, of course, that there are other wire centers in which competi-

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[79] *TRRO*, n.445.

[80] *TRRO*, ¶ 82.

[81] *TRRO*, ¶ 187.

[82] *TRRO*, ¶ 188.

[83] *See, e.g.*, Verizon Boston Petition at 22-23.

[84] For instance, Verizon asserts in each of its Petitions that there are one or more competing fiber providers in at least X% of the Y wire centers in the relevant MSA that accounts for 80% of Verizon's high-capacity special access revenues. *See, e.g.*, Verizon Boston Petition at 21.

tors are *not* present) and that its retail business switched access lines have declined.[85] Yet, as explained above, its access line loss percentages are invalid and overstated, because, as Verizon admits, they do not attribute MCI to Verizon.[86] Moreover, all ILECs are experiencing access line losses and Verizon has not shown that its losses are due to any conditions specific to the six MSAs.[87] In any event, these facts, even if true, do not support forbearance from loop and transport unbundling obligations throughout an entire MSA, especially since the *Omaha* and *ACS Orders* require a more specific demonstration of the extent of competition by wire center location.

Verizon submits that the mere presence of fiber-based competitors implies effective competition. Its claim, however, is remarkably similar to the Commission's Phase II special access pricing flexibility triggers,[88] which have been discredited as accurate predictors of facilities based competition.[89] The Commission's expectation in adopting the triggers was that the "substantial competition" evidenced by the presence of fiber-based carriers would discipline special access rates and drive them downward. However, as discussed elsewhere herein, Phase II special

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[85] *See, e.g.,* Verizon Boston Petition at 22-23.

[86] *See, e.g.,* Verizon Boston Petition, Attachment A at n.2.

[87] *See, e.g., Local Telephone Competition: Status as of December 31, 2005* at Tables 1 and 2.

[88] To obtain Phase II relief for special access services other than channel terminations to end users, the trigger thresholds are unaffiliated collocation in 50 percent of the LECs' wire centers or in wire centers accounting for 65 percent of the LEC's revenues from these services within the MSA. For channel terminations to end users, the Phase II thresholds are unaffiliated collocation in 65 percent of the LEC's wire centers or in wire centers accounting for 85 percent of the LEC's revenues for these services. *See Special Access NPRM*, at n.58 (citing 47 C.F.R. §§ 69.709, 69.711; *Pricing Flexibility Order*, 14 FCC Rcd at 14235, 14298-300, ¶¶ 25, 146-52).

[89] *See* GAO Report at 12.

access pricing relief has failed to do that. Rather, the evidence submitted in the Commission's proceeding investigating special access rates (WC Doc. 05-25) and the November 2006 GAO Report[90] show that rates have increased in areas where the triggers are satisfied. The special access pricing flexibility triggers have proven incapable of predicting the effectiveness of market forces.[91] It would therefore be irrational to rely upon an analogous "trigger" approach to predict the likelihood that such forces will effectively discipline Verizon's market power in the six MSAs.

In any event, the Commission expressly has rejected the use of MSA-wide tests to assess whether competitors continue to require unbundled access to ILEC loop and transport facilities.[92] The Commission found that applying these rules would remove unbundling obligations "to many ... locations without any proof that a requesting carrier could self-provide or utilize alternative" facilities.[93] In rejecting similar tests proposed by Verizon, the Commission correctly observed that such a "proposal is designed to ignore significant and relevant economic factors that are fundamental to a competing carrier's ability to deploy" alternative facilities.[94]

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[90] *See* GAO Report at 13.

[91] *See* GAO Report at 12.

[92] *See TRO*, ¶ 341 (observing that the test proposed by Verizon "provides little, if any, indication that even [a collocated] competitor has been able to widely, if at all, self-deploy alternative loop facilities in that area" and that even "the presence of a single [C]LEC's collocated transport facility ... is not sufficient evidence that facilities-based competitive entry into a market ... is economically feasible."); *see also UNE Remand Order*, 15 FCC Rcd at 3756-57, ¶¶ 131-32, 3849, ¶ 341 n.673.

[93] *TRRO*, ¶ 84.

[94] *Id.*

D. Cable, Over-the-top VoIP, and Wireless Services Are Not Substitutes to § 251(c)(3) Loop and Transport Facilities

Verizon's request for loop and transport unbundling relief also relies heavily on the alternative voice-grade services offered by intermodal competitors, such as cable, wireless and VoIP.[95] As shown below, such alternative voice-grade services are not substitutes to Verizon's bottleneck loop and transport UNEs.

1. Cable Services

While cable companies may offer wireline voice services, their services do not serve as substitutes to § 251(c)(3) loop and transport facilities as Verizon implies in its Petitions. High-capacity § 251(c)(3) loop and transport UNEs are provisioned over copper and/or fiber facilities that are dedicated to a customer or a carrier. Therefore the customer has a private circuit or dedicated bandwidth along with the flexibility to utilize the capacity of the facilities to handle data and voice applications in a manner that best suits the customer or carrier. In contrast, services offered by cable companies are provisioned over a shared network, in which facilities are not dedicated to an individual customer or carrier but are shared by all the users on the network. As the Commission explained in the *TRRO*, "bandwidth, security, and other technical limitations on cable modem service render it an imperfect substitute" for services provided over unbundled facilities.[96] Cable networks therefore are not suitable competitive alternatives to the dedicated and private high-capacity wireline facilities Verizon provides under § 251(c)(3).

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[95] *See, e.g.,* Verizon Boston Petition at 4-14.

[96] *TRRO*, ¶ 193.

2. VoIP and Wireless Services

Nor are VoIP and wireless services substitutes to § 251(c)(3) loop and transport unbundling. Verizon attempts to demonstrate otherwise but its assertions simply repeat claims the Commission expressly rejected in both the *Omaha* and *ACS Orders*. In the *Omaha Order*, the Commission found, among other things, that because Qwest had not submitted sufficient data showing how VoIP and wireless services are substitutes to § 251(c)(3) loop and transport facilities, it did not rely on "intermodal competition from wireless and interconnected VoIP services to rationalize forbearance from unbundling obligations."[97] In addition, the Commission has repeatedly and correctly held that intermodal competition from wireless and VoIP providers is not a significant source of competitive restraint on traditional ILEC wireline services nor could it be deemed an equivalent substitute to an ILEC's wireline service.[98] Verizon nonetheless asserts that forbearance from § 251(c)(3) loop and transport unbundling obligations is appropriate because the threat from wireless and VoIP intermodal competition is "more advanced in [these] MSA[s] than ... [it was] ... in Omaha."[99] As demonstrated below, the Commission should reject these arguments as it did in the *Omaha* and *ACS Orders*, and hold that competition from these intermodal sources do not support the drastic unbundling relief Verizon seeks.

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[97] *Omaha Order*, ¶ 72; *see also ACS Order*, ¶ 29 (concluding that "we do not include competition from wireless and interconnected VoIP services in [the] market analysis") .

[98] *See, e.g.*, *TRRO*, n.118 & ¶ 193 n.508; *TRO*, ¶ 230.

[99] *See, e.g.*, Verizon Boston Petition at 3.

a. Verizon's claims that wireless and VoIP intermodal competition support unbundling forbearance were already rejected in the *Omaha* and *ACS Orders*

According to Verizon, it is experiencing a significant intermodal threat from wireless service because a "growing number[] of customers are using wireless service in place of their traditional wireline service."[100] It contends that the threat of "wireless cannibalization" will discipline wireline price increases.[101] Verizon further claims that competition from "over-the-top" VoIP providers affords similar protection because such service offerings are "comparable to Verizon's wireline telephone service, at prices that typically are lower than Verizon's prices, even when the price of the underlying broadband connection is taken into account."[102] It submits that VoIP services are threatening to traditional ILEC wireline service because, as broadband access becomes more ubiquitous, additional customers are likely to find VoIP to be an attractive alternative.[103]

Verizon's claims ring hollow. As Qwest and ACS failed to demonstrate in Omaha and Anchorage, respectively,[104] Verizon fails to demonstrate here that consumers in the relevant markets are substituting either wireless or VoIP services for Verizon's traditional wireline service. Indeed, Qwest mustered similar arguments in its Petition[105] and offered statistics pur-

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[100] *Id.* at 11.

[101] Verizon Boston Petition at 11-12.

[102] *Id.* at 12.

[103] *Id.* at 14.

[104] *Omaha Order*, ¶ 72; *ACS Order*, ¶ 29.

[105] Qwest Petition at 9.

porting to show that wireless service is available throughout the Omaha MSA, wireless use is extensive, and that an increasing number of wireless users were substituting wireless service for wireline.[106] With respect to VoIP, Qwest noted that customers with *access* to a broadband connection could readily switch to a VoIP provider at some point in the future.[107] ACS made similar arguments.[108]

Despite the *Omaha Order's* unequivocal rejection of Qwest's assertions,[109] Verizon repeats them in each of its Petitions. Indeed, with one exception,[110] Verizon's arguments are no different.[111] Consistent with its deficient analysis as a whole, Verizon uses general, MSA-wide statistics and general nationwide observations from industry analysts showing increases in wireless market share to support its arguments.[112] However, the *Omaha Order* found such arguments are insufficient to "rationalize forbearance from unbundling obligations"[113] and the *ACS Order* did as well.[114] The Commission must conclude likewise in this instance. The Commission's forbearance analysis requires detailed information that allows it to apply a more

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[106] Qwest Petition at 9-12.

[107] *Id.* at 12.

[108] ACS Petition at 16-19.

[109] *Omaha Order*, ¶ 72.

[110] Verizon's only new argument is that wireless service packages are comparable to those offered by Verizon.

[111] *See, e.g.*, Verizon Boston Petition at 8-14.

[112] *Id.* at 11-12.

[113] *Omaha Order*, ¶ 72.

[114] *ACS Order*, ¶ 29 & n.90 (rejecting ACS's reliance "upon general statements by industry analysts").

granular, "wire center analysis" from which it can determine whether Verizon "faces sufficient facilities-based competition to ensure that the interests of consumers and the goals of the Act are protected under the standard of section 10(a)."[115] The Commission should adhere to its precedent, and summarily refuse to consider intermodal competition from wireless and over-the-top VoIP services when ruling on Verizon's Petitions.

b. Wireless and VoIP services are not equivalent alternatives

Even if the Commission considered Verizon's claims, it would find that neither wireless nor over the top VoIP services are equivalent substitutes for ILEC wireline services. In fact, with respect to wireless providers, the Commission found in the *TRO* that "CMRS connections in general do not yet equal traditional landline local loops in their quality, their ability to handle data traffic, and their ubiquity."[116] The same holds true for the enterprise wireless services. The Commission determined in the *TRRO* that the record "does not indicate that other intermodal options, such as *fixed wireless* and satellite, offer significant competition in the enterprise loop market."[117] Nothing has changed since the *TRRO* to alter this decision.

Nor are over the top VoIP providers equivalent substitutes to the ILEC's wireline service. In the *TRRO*, the Commission readily dismissed arguments by Verizon and SBC that the existence of intermodal competition from VoIP providers justified denial of access to UNEs for the provision of local exchange service.[118] It found that broadband service, which is the essential

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[115] *Omaha Order*, ¶ 61.

[116] *TRO*, ¶ 230.

[117] *TRRO*, ¶ 193 n.508 (emphasis added).

[118] *TRRO*, at n.118.

underpinning to VoIP service, was not ubiquitous enough for VoIP to threaten wireline service.[119] It properly concluded that within the existing broadband market, DSL customers must view VoIP service as a supplement to, rather than a replacement for, wireline service because DSL requires an existing wireline connection.[120] It therefore held that VoIP should not be viewed as "a substitute for wireline telephony."[121] Stated differently, granting forbearance from § 251(c)(3) unbundled loop obligations may restrict some carriers from participating in the broadband market in each of the MSAs, so it could adversely affect the availability of VoIP services as well.[122] Hence, Verizon's claim that loop and transport unbundling forbearance is appropriate due to the "added source of competitive discipline" of VoIP providers is clearly wrong.

At bottom, the extent of competitive alternatives for voice services from cable, VoIP, and Wireless to Verizon's retail wireline voice services are by no means a barometer of the extent of competitive alternatives to Verizon's bottleneck loop and transport facilities. At most, Verizon's factual allegations, if true, would only demonstrate that forbearance relief is justified for § 251(c)(3) voice grade switching.[123] Verizon has not shown that facilities-based competition

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[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *See also* Letter from John F. Dudley, Counsel, Commonwealth of Virginia State Corporation Commission, to Marlene H. Dortch, Secretary, FCC, WC Docket 06-172, Attachment at 8 (filed Dec. 15, 2006).

[123] The Commission has already granted such unbundling relief. *See TRRO*, ¶ 199; *TRO*, ¶ 419.

exists for the full capabilities of its wireline § 251(c)(3) loop and transport UNEs and that forbearance from this obligation is justified.

E. Verizon's Special Access, § 271, and Resale Offerings Do Not Support Forbearance

Verizon also asserts that forbearance from its loop and transport unbundling obligation is warranted because UNE-based carriers have access to Verizon's facilities via other offerings such as Wholesale Advantage, resale and special access.[124] Although the Commission found such other offerings were sufficient substitutes for these UNEs and would preserve local exchange competition in Omaha,[125] the circumstances are considerably different in the MSAs at issue here.

For instance, when the Commission granted Qwest's request for forbearance from offering § 251(c)(3) loop and transport facilities in nine wire centers in Omaha, it admitted that there were no significant sources of wholesale inputs for carriers in the Omaha geographic market.[126] Yet it found that Qwest's other wholesale offerings will protect local competition and "will continue to be adequate without unbundled loops and transport offerings."[127] With respect to the

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[124] *See, e.g.*, Verizon Boston Petition at 14-15, & 24.

[125] *Omaha Order*, ¶ 67. In the *ACS Order*, the Commission also found that ACS's tariffed wholesale offerings, resale under § 251(c)(4), along with imposing a 271 like condition (since ACS is not a BOC) that requires ACS to continue providing wholesale access to legacy loops in the Anchorage study area at commercially negotiated rates, terms and conditions "are sufficient wholesale inputs to preserve and foster a vibrant competitive retail market in those wire center service areas where GCI has deployed its own last-mile facilities." *ACS Order*, ¶ 44.

[126] *Omaha Order*, ¶ 67; *see also ACS Order*, ¶ 30 (the Commission concluded likewise in Anchorage).

[127] *Omaha Order*, ¶ 67; *see also ACS Order*, ¶ 44.

mass market, the Commission noted that Qwest provides UNE-P wholesale arrangements and that Qwest's obligation to make its retail services available for resale pursuant to § 251(c)(4) resale along with loops and transport pursuant to § 271(c) remains in place.[128] As to the enterprise market, the Commission explained that carriers can also compete using Qwest's special access services.[129] It therefore concluded that unbundling loops and transport pursuant to section 251(c)(3) is "no longer necessary to ensure that the prices and terms of Qwest's telecommunications offerings are just and reasonable and nondiscriminatory under section 10(a)(1)." [130]

The Commission could not justifiably reach a similar conclusion with respect to Verizon's Petitions. First, the Commission cannot find that Verizon "commercial" wholesale products will be offered on just, reasonable, and nondiscriminatory terms because Verizon has refused to disclose what those terms will be. Verizon alleges, citing the *Omaha* Order, that it will have "the incentive to make attractive wholesale offerings available so that it will derive more revenue indirectly from retail customers who choose a retail provider other than [the ILEC]."[131] However, when competitors asked Verizon to disclose (subject to the *Protective Order*) under what terms and conditions it will offer those "attractive" wholesale products, Verizon ignored the request.[132] If the terms truly were attractive, Verizon would have no reason to conceal them from

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[128] *Omaha Order*, ¶ 67.

[129] *Id.*, ¶ 68.

[130] *Id.*, ¶ 68.

[131] Verizon Boston Petition, at 14 (quoting *Omaha Order*, ¶ 67).

[132] *See* Letter from Patrick Donovan, Counsel for Cavalier Telephone, LLC, Bingham McCutchen, LLP, to Marlene H. Dortch, Secretary, FCC, WC Doc. No. 06-172 (Sep. 29, 2006).

the Commission. As already noted, the Commission should presume that Verizon chose to withhold this information because it would be unfavorable to its case.[133]

Second, Verizon would not even have the same incentives as Qwest in Omaha to offer reasonable terms and conditions for wholesale services because of the much lower levels in the six MSAs, as compared to Omaha, of retail competition that does not rely on ILEC facilities.[134] As already pointed out in this Opposition, Verizon has failed to show that competitors have their own facilities ubiquitously throughout the six MSAs and actually offer service over them to both the mass and enterprise market segments. Therefore, there is no basis for an assumption that Verizon would have the same presumed incentives as Qwest, or any incentive, to offer reasonable terms and conditions to its competitors.

Third, the availability of Verizon's special access services would be inadequate to protect local competition because prices for special access rates are already at monopolistic levels and will only increase should Verizon be relieved of offering § 251(c)(3) loop and transport UNEs in the MSAs at issue. For instance, Verizon's 2005 interstate special access accounting rate-of-return was 42 percent.[135] This return reflects Verizon's dominant market power because it far

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Verizon still has not responded to this request for disclosure of its proposed terms and conditions for wholesale access.

[133] *See* note 35 above.

[134] *See, e.g.*, Verizon Boston Petition at 14.

[135] This is based on Verizon's own Automated Reporting Management Information System (ARMIS) data.

exceeds the last authorized rate-of-return of 11.25%[136] for such services and a return that would otherwise be made if the wholesale market were fully competitive.[137]

After the Commission granted Verizon's request for Phase II special access pricing flexibility in the MSAs covered in these petitions, because it believed there was sufficient competitive pressure to cause Verizon to lower its special access rates,[138] Verizon instead *raised* its special access rates for DS1 and DS3 channel terminations and channel mileage.[139] For example, Verizon's special access pricing flexibility rates in these MSAs for a DS1 10-mile circuit are 20 to 30 percent higher than its regulated price cap rates.[140] Thus, the Commission's prediction that adequate competitive alternatives exist to constrain Verizon's anticompetitive pricing of special

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[136] *Special Access NPRM*, ¶ 60 (citation omitted).

[137] *See* WC Doc. 05-25, Initial Comments of ATX *et al.* at 7-10 (June 13, 2006); Reply Comments of ATX *et al.* at 10-14 (July 29, 2005).

[138] Verizon received Phase II pricing flexibility relief for channel mileage in the six MSAs at issue here. With respect to channel terminations, Verizon has Phase II pricing relief in Pittsburgh and Virginia Beach MSAs and Phase I relief in the remaining four MSAs. *Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport*, CCB/CPD Nos. 00-24 and 00-28, Memorandum Opinion and Order, 16 FCC Rcd 5884, 5885 (Com. Car. Bur. 2001); *Petition of Verizon for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File No. 01-27, Memorandum Opinion and Order, 17 FCC Rcd 5359 (Com. Car. Bur. 2002). To obtain Phase II relief for special access services other than channel terminations to end users, the trigger thresholds are unaffiliated collocation in 50 percent of the LEC's wire centers or in wire centers accounting for 65 percent of the LEC's revenues from these services within the MSA. For channel terminations to end users, the Phase II thresholds are unaffiliated collocation in 65 percent of the LEC's wire centers or in wire centers accounting for 85 percent of the LEC's revenues for these services. 47 C.F.R. §§ 69.709, 69.711; *Pricing Flexibility Order*, 14 FCC Rcd at 14235, 14298-300, ¶¶ 25, 146-52.

[139] *See* Ad Hoc Telecommunications Users Committee Comments, WC Doc. No. 05-25, at 21 and Attachment C at 1-4 (filed June 13, 2005). The analysis was performed based on a 10-mile circuit (either DS1 or DS3) since pricing flexibility was granted.

[140] *Id.*

access has proven entirely inaccurate and the lack of competition leaves Verizon free to increase rates above competitive levels. The GAO Report further confirms this.[141]

Moreover, Verizon's implicit argument that special access is a sufficient alternative to UNEs "rests on the flawed assumption that any carrier using special access is competing successfully in the local exchange markets."[142] As the Commission explained in the *TRRO*, "[t]his is not so" because "the majority of special access arrangements are used to provide service in the mobile wireless and long distance markets."[143] In addition, "[t]hese arrangements clearly are not pertinent to the state of the local exchange market."[144] Even so, a "carrier's use of tariffed incumbent LEC offerings does not conclusively demonstrate that it is doing so successfully, or could continue to do so."[145] The Commission further emphasized that, "unlike in the mobile wireless and long distance services markets, carriers generally make only limited use of special access offerings to provide service in the local exchange services market."[146] It also explained that "[t]o the extent competitive LECs are utilizing special access, many carriers may be using such services rather than UNEs, not because special access is a wholesale input that enables

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[141] GAO Report at 12-13.

[142] *See TRRO*, ¶ 64.

[143] *Id.*

[144] *Id.*

[145] *See TRRO*, ¶ 64.

[146] *Id.*

competitive LECs to economically compete long-term, but rather because, for various reasons, use of special access has been a necessary precondition to eventual UNE-based competition."[147]

The Commission recognizes that the availability of UNEs priced at cost-based rates provides downward pricing pressure on Verizon's special access rates[148] and that "the availability of UNEs is itself a check on special access pricing."[149] In the *Verizon/MCI Order*, the Commission reaffirmed this conclusion and stated that "regardless of whether competitors are able to negotiate significant discounts, where competitive duplication of the last-mile facility is not economic, competing carriers will be able to rely on high-capacity loop and transport UNEs priced at Total Element Incremental Cost (TELRIC) …."[150]

Hence, if the Commission were to relieve Verizon of its obligation to offer § 251(c)(3) loop and transport facilities in the MSAs at issue, Verizon's special access rates for DS1 and DS3 facilities in these areas would increase beyond their already inflated levels.[151] Likewise,

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[147] *Id.*

[148] *TRRO,* ¶ 63 (explaining that UNEs discipline anticompetitive price squeezes).

[149] *TRRO,* ¶ 65.

[150] *Verizon/MCI Order,* ¶ 43; *see also Verizon/MCI Order,* ¶ 51 (explaining that "where UNEs are available, they provide an alternative for special access service and might serve to constrain, at least to some extent, special access price increases and other raising rivals' costs strategies.") (citing *TRRO,* ¶¶ 167-181 & 62-65).

[151] Although, as Verizon states in its Petitions, the *Verizon/MCI Order* prohibits Verizon from raising its DS1 and DS3 special access rates for 30 months following the merger closing (*i.e.*, July 28, 2008), Verizon would likely increases its prices shortly after that time frame. *Verizon/MCI Order, Appendix G,* Special Access Condition No. 5. Relatedly, given Verizon's voluntary commitment to freeze UNE rates until January 28, 2008, forbearance from the underlying obligation to provide unbundled loops and transport in the six MSAs prior to this time would nullify this commitment. *Id.* UNE Condition No. 1.

Verizon's rates for its § 271 DS1 and DS3 loop and transport along with its Wholesale Advantage offerings would not discipline Verizon's anticompetitive instincts to further raise special access prices because absent Commission intervention, Verizon's position, which competitors vigorously dispute, is that its § 271 obligation is fulfilled by making § 271 checklist items available at special access rates.[152] Verizon also has not shown that stand alone copper loops would be set at competitive rather than monopolistic levels.[153] In any event, because Verizon's § 271 obligations do not apply in portions of MSAs previously served by GTE, these obligations could not serve as a competitive safeguard in ex-GTE areas if unbundling forbearance were granted.[154]

Similarly, the Commission should recognize that Verizon's obligation to make its retail services available for resale pursuant to § 251(c)(4) at the avoided cost discount would not protect competition in the absence of § 251(c)(3) loop and transport unbundling. This is especially true given: (a) *Iowa II*'s *vacatur* that serves to reduce the resale discount rate rather than

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[152] *VERIZON-MAINE Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, Order at 8 (Me. P.U.C. Oct. 6, 2006) (explaining that Verizon position is that its special access rates were lawfully approved by the FCC and that the FCC has "expressly approved" special access rates as the benchmark for section 271 elements).

[153] *See* Letter from Patrick Donovan, Counsel for Cavalier Telephone, LLC, Bingham McCutchen, LLP, to Marlene Dortch, Secretary, FCC, WC Doc. No. 06-172 (Sep. 29, 2006).

[154] *See* Letter from John F. Dudley, Counsel, Commonwealth of Virginia State Corporation Commission, to Marlene H. Dortch, Secretary, FCC, WC Docket 06-172, Attachment at 7 (filed Dec. 15, 2006) (explaining that § 271 obligations do not apply to Verizon South, which operates in a large portion of the Virginia Beach MSA, because it is former GTE rather than a former BOC service area).

increase it;[155] (b) the Commission's holding that the wholesale discount rates should not be "set at levels that ensure the viability of the reseller's business";[156] and (c) the Wireline Bureau's ruling that the resale discount rate cannot be adjusted to "manipulate the level of profitability of resale market entry" and that "it is up to the market place to determine how much competition will develop via resale."[157] Because of these Commission statements, the Massachusetts Department of Telecommunications and Energy recently established resale discount rates in a manner that ignored whether they would protect and promote competition.[158] Thus, § 251(c)(4) resale is by no means a safeguard that could protect competition if § 251(c)(3) loop and transport UNEs were not available and Verizon has not shown otherwise.

F. Verizon Presents No Arguments to Support Forbearance from Offering Inside Wire Subloop UNEs

Although Verizon frames its Petition, in part, as one for forbearance from loop and transport unbundling requirements, it fails to make any case for relief from its obligation under 47 C.F.R § 51.319(b) to provision inside wire subloops and subloops for access to multiunit prem-

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[155] *Iowa Utilities Board v. FCC*, 219 F.3d 744, 754-56 (8th Cir. 2000) ("*Iowa II*").

[156] *Local Competition Order*, ¶ 914.

[157] *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Doc. Nos. 00-218, 00-251, Memorandum Opinion and Order, 18 FCC Rcd 17722, DA 03-2738, ¶ 670 (Wireline Bureau rel. Aug. 29, 2003).

[158] *Investigation by the Department of Telecommunications and Energy on its own motion as to the propriety of the rates and charges set forth in the following tariff: M.D.T.E. No. 14, filed with the Department on June 16, 2006, to become effective July 16, 2006, by Verizon New England, Inc. d/b/a Verizon Massachusetts*, DTE 06-61, at 20 (Mass. D.T.E. Jan. 30, 2007).

ises wiring. Because of this, the Commission must deny Verizon's petition with respect to these UNEs.

The competitive demand for these subloop UNEs should not be overlooked in addressing Verizon's Petitions. In the *TRO*, the Commission specifically and separately considered the issue of impairment with respect to subloops used to access multiunit premises. It found that,

> Because of their prior exclusive access, incumbent LECs have first-mover advantages with respect to access to customers in multiunit premises. Requesting carriers face many barriers in accessing customers in multiunit premises, including a general prohibition against facilities-based access; prohibitive sunk costs associated with rewiring a building to serve potentially only a single customer; the refusal for reasonable access to the existing premises wiring; or the refusal to allow installation of a carrier's own new wiring.[159]

Moreover, the Commission recognized, subloops to gain access to multiunit premises "are extremely time-consuming and expensive to duplicate on a pervasive scale and self-provisioning can be prohibitively costly."[160] Likewise, "the loop itself can be overwhelmingly difficult for competitors to self-deploy due to the sunk and fixed costs associated with entry."[161] The Commission therefore concluded, "[f]or all requesting carriers, especially carriers constructing facilities-based networks, the ability to access subloops at, or near, the customer's premises in order to reach the infrastructure in those premises where they otherwise would not be able to take their loop the full way to the customer, is critical."[162]

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[159] *TRO*, ¶ 348

[160] *Id.*

[161] *Id.*

[162] *Id.*

The Commission also found that requesting carriers are impaired without access to inside wire subloops.[163] It concluded in the *TRO* that,

> The economic impairment competitive CLECs face, generally, with respect to most loops is exacerbated through the outright barriers they face in gaining access to customers from owners of multiunit premises. This impairment is especially problematic in situation where competitors are able to construct and provision a local loop using their own facilities all the way to a customer premises, yet still remain unable to reach the end user in that premises. If competitors can only get as far as the building or property line MPOE with their own facilities because they are prohibited from installing their own customer premises wiring to reach a customer a that premises, the incumbent LEC's inside wire subloop or NID may be the exclusive means of reaching an end user. Often there is no alternative inside wiring other than the incumbent LEC's available at the premises.[164]

Verizon offers no explanation why these conclusions do not continue to be true in the six MSAs at issue. Nor has Verizon specifically shown that forbearance from offering inside wire subloops and subloops used to access multiunit premises as UNEs is justified and that offering them as UNEs is not required to ensure that they are available at just, reasonable and nondiscriminatory rates. Even if loop forbearance is granted to any degree (which it should not), access to cost-based inside wire UNEs will be essential to ensure that CLECs can access the customers served by these facilities. In the *ACS Order*, the Commission denied ACS's request for forbearance from its obligation to provide access multiunit premises wiring because ACS failed to demonstrate forbearance from these obligations under § 10 was justified.[165] For similar reasons, the

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[163] *TRO*, ¶ 354.

[164] *TRO*, ¶ 351.

[165] *ACS Order*, ¶ 24.

Commission should likewise reject Verizon's request for relief from its inside wire unbundling obligations.

V. VERIZON CANNOT SHOW THAT LOOP AND TRANSPORT UNBUNDLING IS NO LONGER NEEDED TO PROTECT CONSUMERS

Under Section 10(a)(2) of the forbearance analysis, the Commission must find that access to § 251(c)(3) loop and transport UNEs is no longer needed to protect consumers in the six MSAs at issue.[166] In the *Omaha Order*, the Commission concluded that access to such § 251(c)(3) UNEs was no longer necessary because existing competition from Cox in the local exchange and exchange access markets, combined with wholesale access rights and other rights CLECs have under sections 251(c) and 271, were enough to ensure the existence of a competitive market in the Omaha MSA.[167] This decision was based on the Commission's belief that Cox used its own network in competing with Qwest and did not "rely[] on Qwest's loops and transport."[168] While the record associated with the *ACS Order* indicated that GCI did rely on ACS for UNEs,[169] the Commission's decision was heavily based on GCI's "announced plans to convert its local exchange service customer base to its own facilities" and the Commission's finding that GCI "credibly demonstrated that it perceives financial and business incentives to reduce as fast

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[166] 47 U.S.C. § 160(a)(2).

[167] *Omaha Order*, ¶ 71 & 73; *see also ACS Order*, ¶ 48 (finding that the "251(c)(3) access obligation for UNE loop and transport elements and section 252(d)(1) pricing obligation is no longer necessary to protect consumers [in five wire centers] in part because sufficient alternative facilities and facilities access obligations exist to ensure competitive market conditions.").

[168] *Omaha Order*, ¶ 73.

[169] *ACS Order*, ¶ 30.

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as possible its dependence on ACS-provided UNE loops."[170] Because these orders relied heavily on this evidence in concluding that Section 10(a)(2) was satisfied, the Commission should not grant Verizon's request for forbearance from § 251(c)(3) loop and transport unbundling unless there is similar evidence that competitors are using their own networks to compete or have "credibly demonstrated" their plans to do so.[171]

Verizon's Petitions lack such evidence. Even if it had provided such evidence, forbearance would not be appropriate because competitors continue to rely heavily on Verizon's facilities, as demonstrated in Section II.B above. Hence, the continued availability of § 251(c)(3) loop and transport facilities in each MSA at issue remains necessary to promote and protect competition in these markets, ensure customers in each of them have, and continue to have, competitive choices. Thus, Verizon cannot demonstrate that Section 10(a)(2) is satisfied.

VI. SECTION 251(C)(3) LOOP AND TRANSPORT UNBUNDLING FORBEARANCE IS CONTRARY TO THE PUBLIC INTEREST

Section 10(a)(3) of the forbearance analysis requires that the Commission find that access to § 251(c)(3) loop and transport UNEs in the six MSAs at issue is no longer in the public interest.[172] Section 10(b) states that in arriving at this conclusion, the Commission must find that forbearance "will enhance [and] ... promote competition among providers of telecommunications services."[173]

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[170] *ACS Order*, at n.84 and n.118.

[171] *ACS Order*, n.118.

[172] 47 U.S.C. § 160(a)(2).

[173] 47 U.S.C. § 160(b).

In the *Omaha Order*, the Commission found that the Section 10(a)(1) considerations would be consistent with the public interest under Section 10(a)(3).[174] It also concluded that "granting Qwest relief from its loop and transport unbundling obligations in parts of the Omaha MSA will help promote competitive market conditions and enhance competition among providers of telecommunications services as contemplated by section 10(b)."[175] It further held that "the costs of unbundling obligations in parts of the Omaha MSA outweigh the benefits."[176] The Commission explained that forbearance was in the public interest because regulatory intervention results in reduced incentives to innovate and invest in facilities as well as creating the additional problem of regulating the sharing of facilities.[177] It stated that the high degree of regulatory intervention required by the Telecommunications Act of 1996 to generate competition is no longer justified where "local exchange markets are sufficiently competitive," such as in the nine Omaha wire centers where Qwest was granted forbearance, and that forbearance would also serve the public interest by increasing regulatory parity in the Omaha telecommunications services market.[178]

In the *ACS Order*, the Commission concluded that relieving ACS from the section 251(c)(3) access obligations and section 252(d)(1) pricing obligations for loop and transport

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[174] *Omaha Order*, ¶ 75.

[175] *Id.* ¶ 75.

[176] *Id.* ¶ 76.

[177] *Id.*

[178] *Id.* ¶ 78.

elements, subject to the condition it adopted, was in the public interest under section 10(a)(3).[179] It explained that the factors upon which its conclusions under Sections 10(a)(1) and (2) were based also convinced it that such relief will help promote competitive market conditions and enhance competition among providers of telecommunications services as contemplated by section 10(b).[180]

The same cannot be said of the six MSAs for which Verizon seeks § 251(c)(3) loop and transport unbundling relief. As shown below, Verizon's forbearance request fails to meet the Section 10(a)(3) public interest standard as interpreted and applied by the Commission in both *Omaha* and *ACS Orders.*

First, the Section 10(a)(1) considerations discussed above demonstrate that Verizon's request for unbundling relief is not in the public interest.

Second, as shown in Section III, above, granting Verizon's request will not enhance [and] … promote competition among providers of telecommunications services" as section 10(b) requires.[181]

Third, there is no evidence that Verizon's wireline competitors have facilities coverage of a percentage of the end user locations accessible from each of the wire centers in the six MSAs comparable to the market shares found by the Commission in the *Omaha* or *ACS Orders,*[182] The Commission has emphasized that the public interest in establishing regulatory parity between

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[179] *ACS Order*, ¶ 49.

[180] *Id.*

[181] 47 U.S.C. § 160(b).

[182] *Omaha Order*, ¶ 69; *see also ACS Order,* ¶ 31.

competitive carriers and ILECs is *not* served until "the benefits of competition are sufficiently realized and competitive carriers have constructed their own last mile facilities and their own transport facilities."[183] Verizon has not satisfied this evidentiary burden and, as demonstrated above, it still remains the dominant provider of business and residential telecommunications services. Nor has Verizon shown that competitive wireline loop and transport facilities to end users ubiquitously exists throughout each of the six MSAs at issue.[184] Because adequate competitive alternatives to Verizon's bottleneck facilities have not developed in the relevant MSAs, it would not be in the public interest to grant Verizon's forbearance petition as to § 251(c)(3) unbundling.

In the *Omaha Order*, the Commission made a "predictive judgment" that Qwest would not strand competitive investments by curtailing access to its analog, DS-0, DS-1, or DS-3-capacity facilities.[185] It postulated that Cox's ability to absorb customers onto proprietary network would supply enough competitive pressure to force to Qwest to "maximize use of its existing local exchange network, providing service at retail *and at wholesale*."[186] The Commission predicted this because Cox had its own loops and transport connected to a certain percentage of Qwest's end-users in the nine wire centers in Omaha, and thus the potential existed that

[183] *Omaha Order*, ¶ 78; *see also ACS Order*, ¶ 28.

[184] Furthermore, for the reasons stated in section IV.D.2 above, intermodal competition from VoIP and Wireless providers are not substitutes for wireline services. For this reason, the Commission should not consider intermodal competition in determining whether Verizon's requested forbearance relief is in the public interest.

[185] *Omaha Order*, ¶ 80.

[186] *Id.* ¶ 81.

Cox would absorb customers into its proprietary network. The Commission made similar findings in the *ACS Order* with respect to the five wire centers where forbearance relief was granted.[187] However, unlike Omaha and ACS, Verizon has not attempted to demonstrate that its competitors have facilities deployed to a substantial portion of the end users throughout each of the wire centers in each of the six MSAs and can absorb customers without any reliance on Verizon's facilities. Lacking such evidence, the Commission cannot conclude that Verizon would face similar competitive pressure and thus there is no reason to believe Verizon will not curtail competitive access to its facilities.

Similarly, it would be a mistake for the Commission to conclude that Verizon's existing obligations to offer special access or section 271 loop and transport facilities are sufficient alternatives to § 251(c)(3) facilities. The Commission's prediction to that effect in Omaha has been proven wrong by experience.[188] Further, market pressures in the six MSAs at issue here have not forced Verizon to reduce its special access rates; rather, it has increased them. The simple fact is that § 251(c)(3) loop and transport forbearance will harm competition in MSAs

[187] *See ACS Order*, ¶ 44 & 49. The Commission emphasized that given "GCI's increasing ability to absorb customers over its own last-mile facilities, ACS will be subject to very strong market incentives to ensure that its network is used to optimal capacity – irrespective of any legal mandate that it do so." *ACS Order*, ¶ 49. "Faced with aggressive 'off-net' competition from GCI," the Commission predicted that "ACS will endeavor to maximize use of its existing local exchange network, providing service at retail and at wholesale, in order to minimize revenue losses resulting from customer defections to GCI's service." *Id.*

[188] *See* Letter from Chris MacFarland, Group Vice President - Chief Technology Officer, McLeodUSA, to Marlene Dortch, Secretary, FCC, WC Docket 05-281 (filed Dec. 15, 2006) (explaining that because forbearance granted by the FCC in the Omaha Market has made it extremely difficult for McLeodUSA to remain in the Omaha market and has severely devalued the investment in its network facilities in the market, McLeodUSA "will either sell or cease its operations in the market, despite its enormous investment in its own network and facilities") (attached hereto as Exhibit B).

where Verizon seeks it. Verizon has failed to satisfy the standards set in the *Omaha Order*, much less demonstrate that forbearance "will enhance [and] ... promote competition among providers of telecommunications services."[189] Rather, removing Verizon's unbundling obligations will thwart competition by forcing competitive carriers with no other options to purchase loops and transport at above-market prices. This will undermine their ability to compete, which runs contrary to the public interest standard.

VII. FORBEARANCE FROM § 251(C)(3) LOOP AND TRANSPORT UNBUNDLING IS UNLAWFUL

Verizon's Petitions claim that unbundling relief is justified by the Commission's analysis in the *Omaha Order* where the Commission granted forbearance from its § 251(c)(3) loop and transport unbundling obligations in nine wire centers. However, as shown below, the *Omaha Order*'s analysis was flawed,[190] and the Commission should not exacerbate its error by granting Verizon's Petitions for § 251(c)(3) unbundling relief.

A. The Commission May Not Decouple § 10 Forbearance from § 251(d)(2) Impairment

1. The language and structure of § 10 requires that the commission include the § 251(d)(2) impairment standard in evaluating ILEC requests for forbearance from § 251(c)((3) unbundling

Section 10(b) directs the Commission to "consider whether forbearance ... will promote competitive market conditions, including the extent to which such forbearance will enhance

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[189] 47 U.S.C. § 160(b).

[190] As explained elsewhere, the Commission applied the same analytical framework in the *ACS Order*. *See ACS Order*, ¶¶ 9 & 32. Because of this, the analysis in *ACS Order* is similarly flawed.

competition among providers of telecommunications services." 47 U.S.C. § 160(b). The primary tool Congress conferred on the Commission to assess competition among providers of telecommunications services was the market opening provisions of section 251(c) and the impairment standard of section 251(d)(2). In other words, impairment remains the "touchstone" for assessing whether competitive entry into monopoly markets is achievable absent access to parts of the incumbent's network.[191]

The Commission may not reasonably determine the impact on competition as required under Section 10(b) without consideration of impairment under Section 251(d)(2). Thus, section 10(d) effectively requires the FCC to consider impairment when the forbearance requested is from section 251's mechanisms designed to induce competition between telecommunications providers. The "fully implemented" requirement of Section 10(d), for example, directly links forbearance to the Act's unbundling provisions in sections 251 and 271. It therefore violates the Act for the Commission to forbear from the Act's unbundling requirements without considering the extent to which competitive carriers are impaired under Section 251(d)(2). The Commission should not repeat its failure to do this in the *Omaha Order* and arbitrarily dispense with UNE-based intramodal competition in Verizon's markets in spite of obvious impairment.[192]

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[191] *See United States Telecom Ass'n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002).

[192] If the Commission applies a different test than the carefully crafted impairment test, it must provide a rational explanation for its departure from precedent. This explanation must include a thorough explanation of how its standard for evaluating impairment under section 10 is different than its standard for evaluating impairment under section 251 and why abandoning the touchstone of impairment is warranted.

2. The Commission's forbearance analysis must be consistent with the impairment analysis

The D.C. Circuit's decision in *AT&T Corp. v FCC*,[193] requires that the Commission review forbearance requests in a manner that is consistent with the Commission's prior policies and standards applied in similar cases or explain why it is reasonable to depart from them.[194] Thus, when considering petitions for forbearance from the Act's unbundling requirements, the Commission's analysis must be consistent with its impairment framework, in particular the framework establish in the *TRRO* and affirmed by the D.C. Circuit in *Covad*.[195] The *Omaha Order* failed to do this, but the Commission should not repeat that failure with respect to Verizon's Petitions. The statutory impairment standard cannot be ignored simply because Verizon seeks relief under section 10 rather than section 251(d)(1). The relief Verizon requests is the legal and practical equivalent of a finding of non-impairment in particular MSAs identified in Verizon's Petitions. The FCC cannot use the statutory criteria of section 10 "as a form of legal jujitsu to justify its relaxation"[196] of section 251(c)(3) unbundling obligations. Granting Verizon's petition, whether in whole or in part, absent a an impairment analysis consistent with the *TRRO* would represent an unexplained departure from the FCC's recently affirmed impairment standard.[197]

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[193] 236 F.3d 729, 736 (D.C. Cir. 2001) ("*AT&T*").

[194] *Id.* (finding that the Commission's analysis in evaluating forbearance from dominant carrier regulation cannot depart from Commission's traditional non-dominance analysis without justifying such departure.) .

[195] *See Covad Comm'ns Co. v FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[196] *Ass'n of Comm'ns Enters. v FCC*, 235 F.3d 662, 667 (D.C. Cir. 2002).

[197] *See Covad,* 450 F.3d 528.

B. Section 251(c) Has Not Been "Fully Implemented"

Section 10(d) provides that "the Commission may not forbear from applying the requirements of section 251(c) or 271 ... until it determines that those requirements have been fully implemented."[198] Although the *Omaha Order* found that this requirement was satisfied, it relied on a patently unreasonable interpretation of the statute that the Commission should now correct and not repeat when considering Verizon's Petitions.

1. The *Omaha Order*'s interpretation of the term "fully implemented" was unreasonable

The *Omaha Order* improperly concluded that "fully implemented" means no more than an initial rulemaking by the Commission. It further found that the Commission is the entity that "implements" Section 251(c), and "hence the full implementation of section 251(c) is triggered by action taken by this Commission."[199] This interpretation of "fully implemented" was flawed for several reasons.

First, the Commission previously viewed the adoption of its rules as the beginning, not the end, of implementation of Section 251(c). In the *Local Competition Order,* the Commission described its initial adoption of Section 251(c) rules as merely "the initial measures that will enable the states and the Commission to begin to implement sections 251 and 252."[200] The *Omaha Order* failed to address, or even distinguish, the Commission's prior view that implementation of Section 251(c) involves substantial activity by it, the states, and ILECs well beyond any rules it promulgates to implement this section of the Act. For example, the Commission

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[198] 47 U.S.C. §160(d).

[199] *Omaha Order*, ¶ 53.

[200] *Local Competition Order*, 11 FCC Rcd at 15,507, 15,656 ¶¶ 6, 307 (emphasis added).

found that Section 251 involves an "allocation of responsibilities" between itself and the states.[201] Both the Commission and the states administer the Commission's rules and the states perform other critically important functions pursuant to Section 251.[202]

The *Omaha Order* ignores these previous findings that Commission rules are the initial measures needed to implement § 251 and fails to explain its reason for abandoning its precedent.[203] It asserts that Congress intended Section 251(c) to be "fully implemented" under Section 10 upon the mere establishment of rules by the Commission.[204] The Commission silently departed from previous policies and ignored precedent in rendering this decision,[205] but it should not compound this mistake by granting Verizon's Petitions based on this decision.

Second, the *Omaha Order* interpretation of "fully implemented" ignores important differences in the language of Section 251(d)(1) and Section 10(d). Section 251(d)(1) directs the FCC to "to establish regulations to implement the requirements" of Section 251(c) within six months. Section 10(d), in contrast, prohibits forbearance until the requirements of Section 251(c) have been "fully implemented." Congress' use of these terms in Section 10(d) must mean more than merely the establishment of rules "to implement" Section 251, as used in Section 251(d)(1). And,

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201 *Local Competition Order*, ¶ 41.

202 *Id.*, ¶ 53.

203 *See AT&T,* 236 F.3d at 734.

204 The finding of *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") that the FCC in its *TRO* had unlawfully delegated authority to the states to establish, pursuant to Section 251(d)(2), unbundling standards does not invalidate the FCC's view in the *Local Competition Order* that, under the Act, states play a key role, such as through setting prices and conducting arbitrations, in implementing Section 251(c).

205 *AT&T,* 236 F.3d at 736.

as the *Omaha* record reveals,[206] "fully" means "totally or completely." Thus, it must be the case that Congress intended "fully implemented" to mean — at a minimum — that concrete steps have been taken by the FCC, the states, and the Bell Operating Companies ("BOCs") to implement Section 251 beyond the mere initial establishment of rules by the FCC. The FCC's failure in the *Omaha Order* to give any meaning to the term "fully" in Section 10(d) was therefore erroneous.

Contrary to the Commission's ruling in the *Omaha Order*, a plain meaning interpretation of "fully implemented" in the context of Section 10 and the Act means that forbearance from the Act is only permitted when the relevant markets are competitive. The text of the statute does not refer to the Commission's rules regulating those markets. In other words, the statutory inquiry must focus on whether actual market conditions permit forbearance, not whether the FCC has issued regulations that may create such competition. Moreover, in evaluating whether forbearance is in the public interest, Section 10(b) directs the Commission to consider "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."[207] Given this text, Section 10(d) cannot simply be read in conjunction with Section 251(d) to mean that forbearance is warranted when Commission regulations exist. Rather, "fully implemented" must mean that the goals behind Section 251(c), which seeks the development of sustainable competition in the telecommunications market, have been realized.

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206 *See* Opposition of AT&T Corp., WC Docket 04-223, at 26 (filed Aug. 24, 2004)

207 47 U.S.C. § 160(b).

Third, the *Omaha Order's* interpretation of "fully implemented" amounts to an "error in judgment."[208] The Commission's rules ordinarily become effective thirty days after publication in the Federal Register, or even sooner based on special showings.[209] Under the Commission's interpretation of "fully implemented," one must presume that Congress intended for Section 251(c) to be deemed to be fully implemented shortly after the Commission, pursuant to Section 251(d)(1), adopted its original rules on August 6, 1996. But it is highly improbable that Congress intended to allow the Commission to forbear from application of Section 251(c)(3)'s requirements virtually at the moment the FCC's rules for implementing the requirements became effective — and prior to them being overturned three times and before sustainable competition due to that unbundling has truly emerged.

Fourth, the *Omaha Order* improperly disregarded the statements of the D.C. Circuit in 2001 that Section 251(c) had not been fully implemented.[210] The Commission assumed the court meant merely that the Commission had not at that time interpreted "fully implemented."[211] But, like the *Omaha Order*, this ignores the Commission's previous (and correct) view that the initial establishment of rules was the beginning, not the end, of implementation of Section 251(c). The fact that many petitions for reconsideration and clarification of the FCC's 251(c)(3) rules remain

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[208] *AT&T Corp. v. FCC*, 394 F.3d 933, 936 (D.C. Cir. 2005) (citing *Global NAPS, Inc. v. FCC*, 247 F.3d 252, 258 (D.C. Cir. 2001)).

[209] 5 U.S.C. § 553(d).

[210] *Ass'n of Comm'ns Enters. v. FCC*, 235 F.3d 662, 666 (D.C. Cir. 2001).

[211] *Omaha Order*, ¶ 53 n.133.

unresolved[212] and many state proceedings implementing the *TRRO* remain ongoing or have yet to be initiated reinforce this point.[213]

Finally and most significantly, the interpretation of "fully implemented" adopted in the *Omaha Order* is inconsistent with the core objectives of the Act. The Commission has established that a critical question in determining whether section 251 or 271 has been fully imple-

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[212] *See, e.g.*, Petition for Reconsideration of CTC Communications Corp., *et al.*, WC Doc. No. 04-313, CC Doc. No.01-338 (filed Mar. 29, 2005); Petition for Reconsideration of CBEYOND Communications, WC Doc. No. 04-313, CC Doc. No. 01-338 (filed Mar. 28, 2005); Petition for Reconsideration of Birch Telecom, Inc., *et al.*, WC Doc. No. 04-313, CC Doc. No. 01-338 (filed on Mar. 28, 2005); Petition for Reconsideration and/or Clarification of the PACE Coalition, WC Doc. No, 04-313, CC Doc. No. 01-338 (filed on Mar. 28, 2005); Petition for Reconsideration and/or Clarification of Order on Reconsideration of Covad Communications Group, Inc. *et al.*, CC Doc. Nos. 01-338, 98-147, 96-98 (filed Jan. 28, 2005).

[213] For instance, the State commission proceedings implementing the *TRRO* and *TRO* remain ongoing in Delaware, Maryland, and Pennsylvania. *See In the Matter of the Petition of DIECA Communications Inc., d/b/a Covad Communications Company, D-Tel LLC, SNiP LiNK LLC, Xo Communications Services, Inc., f/k/a XO Delaware, Inc., and XTel Communications, Inc., for an Amendment to Interconnection Agreements with Verizon Delaware Inc., Pursuant to Section 252(B) of the Communications Act of 1934, as Amended, the Triennial Review Order and the Triennial Review Remand Order; In the Matter of the Application of Verizon Delaware Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Delaware Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order*, PSC Doc. Nos. 05-164; 04-68; *In the Matter of the Petition of Verizon Maryland Inc. for Consolidated Arbitration of an Amendment to Interconnection Agreements of Various Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Maryland Pursuant to Section 252 of the Telecommunications of 1996*, Case No. 9023; *Petition of Verizon Pennsylvania Inc. and Verizon North Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Pennsylvania Pursuant To Section 252 of the Communications Act of 1934, As Amended, and the Triennial Review Order*, P-00042092. Moreover, Section 252 arbitrations implementing the FCC's *TRO* and *TRRO* rules have yet to be initiated in many states across the Nation.

mented is whether the "goals" of the underlying statutory provisions are fulfilled.[214] It is clear that the goals underlying Section 251's unbundling requirements have yet to be fulfilled.

In drafting Section 10, Congress anticipated that the "forbearance authority will be a useful tool in ending unnecessary regulation."[215] But Section 10 was designed to give the Commission a tool to clear the underbrush of sixty years of regulation that had accumulated since enactment of the original Communications Act — some of which was no longer necessary yet remained on the books. Section 10 was not intended as a destructive black hole that would suck in and annihilate Congress' newly enacted scheme to promote and enhance local competition.

It is unfathomable that Congress would have with one hand "reorganize[d] local telecommunications markets," with the "objective of uprooting the monopolies" over local telecommunications services but with the other hand permit the FCC to repeal those very provisions of the Act before the stated goal was achieved.[216] Congress explicitly limited the FCC's ability to grant forbearance from the Act's market opening provisions until those provisions were "fully implemented."[217]

However, sustainable competition cannot be realized, and thus Sections 251 is not "fully implemented," unless there exists viable cost-based, wholesale alternatives to the ILECs' bottleneck facilities such that incumbent carriers are no longer deemed "dominant" in local services

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[214] *Petition of Verizon for Forbearance from the Prohibition of Sharing, Operating, Installation, and Maintenance Functions Under Section 53.203(a0(2) of the Commission's Rules*, Memorandum and Order, 18 FCC Rcd 23525, ¶ 7 (2003) ("*Verizon Forbearance Order*").

[215] *See* Committee on Commerce Report, HR 1555, Section 103 (104th Congress, July 24, 1995).

[216] *See Verizon*, 535 U.S. at 488.

[217] 47 U.S.C. §160(d).

markets.[218] The *Omaha Order*'s premature finding that Section 251 is "fully implemented contravenes the purpose of the Act, but it flouts the Section 10(d)'s express requirement that the Commission, *as a threshold matter*, find Section 251 "fully implemented" before considering a forbearance petition.[219] The fact remains that Verizon is still the dominant LEC in the MSAs subject to its Petitions because no competitive wholesale market exists and it controls the bottle-neck facilities used by its competitors. The concentration of power is lethal to sustainable competition, and it would be arbitrary and capricious for the Commission to conclude otherwise.

C. It Would Be Inconsistent with the *TRRO* for the Commission to Find that the Availability of Special Access, § 271, and Resale Offerings Justify Forbearance from Verizon's § 251(c)(3) Obligations.

1. Special Access and § 271 facilities are no substitutes to cost-based UNEs

The *Omaha Order* utterly ignored the *TRRO* by relying on the availability of Qwest special access services to justify the elimination of access to unbundled loops and transport. Having ruled in the *TRRO* that it would be a "hideous irony" to rely on special access—"the pricing of which falls largely within [ILEC] control"[220]—the *Omaha Order* irrationally relied *primarily* on the availability of special access in determining that continued application of Section 251(c)(3) was no longer necessary to ensure just, reasonable and nondiscriminatory rates or to protect consumers in the Omaha MSA.

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218 *Cf. Verizon,* 535 U.S. at 538 (upholding Commission rules that interpret the "statutory dut[ies]" of section 251(c) to "reach the result the statute requires" and thereby "get[] a practical result").

219 *Verizon Forbearance Order,* 18 FCC Rcd 23525, ¶¶ 5, 9.

220 *TRRO*, ¶ 59.

The Commission should not take a similar approach when addressing Verizon's Petitions. Without the essential cost-based UNE pricing safeguard, there is nothing to prevent Verizon from raising prices on wholesale services to something "close to or equal to" the retail rate, creating a price squeezes. The Commission itself envisioned this scenario chilling competition. Thus, rather than sustaining a local competitive market, the elimination of Verizon's obligation to provide UNEs will ultimately destroy it by trusting Verizon to maintain competitive wholesale pricing even though the company has little incentive to do so.

The Commission's reliance on the availability of Section 271 checklist items suffers from the same shortcomings as its reliance on the availability of special access. The BOCs contend that Section 271 checklist items are — for all relevant purposes — indistinguishable from special access. As is the case with special access, Section 271 checklist items are not subject to cost-based pricing. Instead, prices for Section 271 checklist items need only comply with the just and reasonable pricing standards of Section 201 and 202,[221] thus creating precisely the same risk of price squeezes that the Commission found to be an issue with special access pricing.

2. Resale is not a substitute for cost-based UNEs

The continued availability of resale services offered by Verizon pursuant to Section 251(c)(4) does not support relieving Verizon of provisioning cost-based loop and transport UNEs. As the FCC explained in the *Local Competition Order*, "carriers reselling [ILEC] services are limited to offering the same service an [ILEC] offers at retail", whereas carriers relying on UNEs can use those piece-parts as inputs to provide any service they choose offer.[222] As a result,

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[221] *TRO*, ¶ 656.

[222] *Local Competition Order*, ¶ 332.

"carriers using [UNEs] ... have greater opportunities to offer services that are different from those offered by [ILECs]" than is the case with carriers relying on resale.[223] The primary means by which a reseller competes with an ILEC is through price, and in that regard, its ability to do so "is limited ... by the margin between the retail and wholesale price of the product."[224] In contrast, UNE-based competitors compete on price as well as through innovation. Accordingly, The Commission has already "reject[ed] the notion [that] the rebundling of UNEs is equivalent to resale."[225]

3. Unbundling forbearance is especially inappropriate given the significant open FCC proceedings related to special access, § 271 and § 251(c)(4) resale offerings

Apart from the fact that forbearance from Verizon's loop and transport unbundling was not appropriate because special access, § 271(c) offerings, and § 251(c)(4) resale are not sufficient competitive alternatives, such forbearance remains inappropriate given the significant open proceedings related to each of these critical obligations, and the numerous unresolved problems associated with their implementation. Because of this, Section 251(3) unbundling is critically needed to ensure that Verizon's telecommunications offerings are available at just, reasonable and nondiscriminatory rates, terms and conditions.

First and foremost, the special access framework is fraught full of problems and does not produce just and reasonable rates, terms and conditions reflective of a competitive market. In fact, in January of 2005 (over two years ago), the Commission opened a rulemaking proceeding

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223 *Id.*

224 *Id.* at 15,668 ¶ 332.

225 *See* 12 FCC Rcd 15,982, 16,131 ¶ 340.

in WC Docket No. 05-25 ("*Special Access NPRM*") to examine the rates, terms and conditions of price cap local exchange carriers' (LECs) interstate special access services and the regulatory framework that should apply to them.[226] The Commission initiated this proceeding as a result of legacy IXC AT&T's ("Legacy AT&T") 2002 Petition for Rulemaking and its 2003 Petition for Mandamus to the D.C. Circuit requesting the court to direct the FCC to act and grant interim relief.[227]

In June and July of 2005, CLECs, IXCs and the Ad Hoc Users Group submitted comments in the *Special Access NPRM* urging interim and long term relief that, in many respects, echoed observations Legacy AT&T made in its 2002 Petition for Rulemaking. They generally claimed that the pricing flexibility triggers[228] and the CALLS[229] plan have failed to produce

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[226] *See Special Access NPRM*, ¶ 19.

[227] *Id.* ¶ 21.

[228] In 1999, the Commission adopted the *Pricing Flexibility Order* to ensure that the Commission's interstate access charge regulations did not interfere with the development of competition within interstate access markets. *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 98-157, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14224-45, 14232-33, 14234-35, 14257-310 (1999) ("*Pricing Flexibility Order*"). In it, the Commission developed competitive triggers designed to measure the extent to which competitors had made irreversible, sunk investment in collocation and transport facilities. Pricing flexibility is obtained by price cap LECs in two separate phases, each on a Metropolitan Statistical Area (MSA) basis. There are separate triggers for two categories of special access services: (1) channel terminations (*i.e.*, loops) connecting a LEC central office to a customer's premises; and (2) all other special access (primarily interoffice transport). Under Phase I Relief, a price cap carrier may offer volume and term discounts and customer-specific contract tariffs for interstate special access services, on one day's notice; however, services that are not offered under a discount or a contract remain subject to the general price cap rules. Under Phase II Relief, a price cap carrier may additionally set its generally-available special access rates at any level without regard to the price cap rules, on one day's notice.

[229] In 2000, the Commission adopted what is known as the CALLS plan. It was proposed by an industry coalition as a means to phase-out implicit subsidies and to move towards a more market-based approach to rate setting over a 5 year period. *See* Eleventh Report and Order in CC

competitive prices, special access rates need to be reset to reflect actual costs, Phase II pricing flexibility should be abolished or tightened, and that some BOC term and volume special access contracts reflect pricing and other terms and conditions that could not be imposed in a fully competitive market.[230] They presented evidence that special access reforms are necessary because special access rates are not at levels that would exist in a competitive market.[231] They showed that special access rates are dramatically higher than the cost-based rates for comparable UNE services or rates offered by competitors.[232] In addition, ARMIS data revealed that the BOCs are enjoying increasing and excessive monopoly profits and returns on special access services.

Since comments were filed in the proceeding, there has been little activity in it. Despite this, the BOCs continue to earn extraordinarily high returns on special access services. Indeed, as

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Docket No. 96-45, 15 FCC Rcd 12962 (2000) ("*CALLS Order*"). The FCC offered price cap carriers a choice between completing the forward-looking cost studies that were required by the previous *Access Charge Reform Order*, or voluntarily making the rate reductions required under the five-year CALLS plan. All price cap carriers opted for the CALLS plan. The goal of the plan was to transition the "marketplace closer to economically rational competition, and [to] enable [the Commission], once such competition develops, to adjust [the] rules in light of relevant marketplace developments." *CALLS Order*, 15 FCC Rcd at 12977.

[230] *See, e.g.*, Comments of ATX *et al.*, WC Docket 05-25 (filed June 13, 2005); Comments of the Ad Hoc Telecommunications Users Committee, WC Docket 05-25 (filed June 13, 2005); Comments of NEXTEL, WC Docket 05-25 (filed June 13, 2005); Comments of COMPTEL/Ascent, WC Docket 05-25 (filed June 13, 2005); Reply Comments of ATX *et al.*, WC Docket 05-25 (filed July 29, 2005); Reply Comments of the Ad Hoc Telecommunications Users Committee, WC Docket 05-25 (filed July 29, 2005); Reply Comments of NEXTEL, WC Docket 05-25 (filed July 29, 2005); Reply Comments of COMPTEL/Ascent, WC Docket 05-25 (filed July 29, 2005).

[231] *See e.g.*, Comments of ATX *et al.*, WC Docket 05-25, at 3-13 (filed June 13, 2005); Reply Comments of ATX *et al.*, WC Docket 05-25, at 7-19 (filed July 29, 2005).

[232] *See e.g.*, Comments of ATX *et al.*, WC Docket 05-25, at 3-7 (filed June 13, 2005); Reply Comments of ATX *et al.*, WC Docket 05-25, at 7-10 (filed July 29, 2005).

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measured by BOCs' ARMIS data, the overall BOC interstate special access accounting rates of return were approximately 38, 40, 44, and 53 percent in 2001, 2002, 2003, and 2004, respectively.[233] **For 2005, it was 68 percent.**[234] Moreover, in 2004, it is estimated that that the BOCs' overcharges yielded \$6.4 billion in excessive special access revenues or \$17.5 million per day.[235] Since the BOCs' accounting rates-of-return from 2004 to 2005 increased by approximately 26%, estimated overcharges are likely that much higher for 2005. Sprint estimated that its 2004 access charge cost was approximately \$103 million higher under the FCC's current pricing flexibility regime than it would have been had those services been available at price cap rates.[236]

Because these year-over-year returns would not be realized if the special access marketplace were truly competitive (which, as noted elsewhere, is what the FCC predicted, erroneously, would be achieved by now), competitive carriers that utilize the BOCs' special access services are paying far more for such services than what would be deemed lawful, *i.e.*, just and reasonable, if rates, terms and conditions associated with them were objectively scrutinized by a regulatory authority. The GAO recent report discussed above confirms this.[237]

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[233] *See Special Access NPRM,* ¶ 27.

[234] The annual rates of return were calculated using ARMIS data reported for interstate special access services. Specifically, we divided the net return by average net investment to calculate the rates of return. *See* ARMIS 43-01, Table 1, Cost and Revenue, rows 1910, 1915, col. s.

[235] Reply Comments of the Ad Hoc Telecommunications Users Committee, WC Doc. No. 05-65, Reply Declaration of Susan M. Gately ¶ 6 (filed May 10, 2005).

[236] Sprint Comments, WC Doc. No. 05-25, at 5 (filed June 13, 2005).

[237] GAO Report at 13 (finding that the Commission's Phase II pricing flexibility rules do not accurately predict competition and that the "prices are higher, on average, in phase II MSAs - where competition is theoretically more vigorous- than they are… where prices are constrained" by price cap regulation).

Second, the availability of Section 271(c) loop and transport facilities provides no safeguards for competition in the MSAs at issue if Verizon's request for forbearance from loop and transport unbundling is granted. As previously discussed, the BOCs contend that they satisfy their Section 271 checklist by offering special access services. Although the Act's just and reasonable pricing standard applies to section 271 elements, the BOCs deny that state commissions have the authority to investigate whether the BOC 271 rates are just and reasonable. The issue of whether state commissions have the authority to establish Section 271 rates and determine what rates are just and reasonable under Section 271 is currently before the Commission in two proceedings.[238] Furthermore, as Verizon realizes, there are competing decisions at the federal district court level and among state commissions on these issues and number of these decisions are still being appealed.[239] The few state commissions that have investigated a BOC's

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[238] *See BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-245 (filed July 1, 2004) (petitioning the Commission to assert exclusive jurisdiction over the enforcement of section 271 and preempt a state commission ruling asserting jurisdiction); *Georgia Public Service Commission Petition for Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates*, WC Dkt. No. 06-90 (filed Apr. 18, 2006).

[239] *See, e.g., Petition of DIECA Communications, Inc., d/b/a Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation*, Docket No. T-01051B-04-0425, Decision No. 68440, 2006 Ariz. PUC LEXIS 5 (Ariz. C. C. Feb. 2, 2006), *appeal pending, Qwest Corp. v. Ariz. Corp. Comm'n*, No. 2:06-CV-01030-ROS (D. Ariz.) (filed Apr. 13, 2006); *In Re: Generic Proceeding to Examine Issues Related to BellSouth Telecommunication, Inc.'s. Obligations to Provide Unbundled Network Elements, Docket No. 19341-U, Order Initiating Proceeding to Set Just and Reasonable Rates Under Section 271*, 2006 Ga. PUC LEXIS 3 (Ga. P.S.C. Jan. 17., 2006) and Order Setting Rates Under Section 271, 2006 Ga. PUC LEXIS 21 (Ga. P.S.C. Mar. 8, 2006), *appeal pending, BellSouth Telecomm., Inc. v. Georgia Pub. Serv. Comm'n et al.*, No. 1:06-CV-00162-CC and *Competitive Carriers of the South, Inc. et al. v. Georgia Pub. Serv. Comm'n*, No. 1:06-CV-0972-CC (consolidated) (N.D. Ga.) (filed Jan. 24, 2006); *BellSouth Telecommunications, Inc.'s Notice of Intent to Disconnect Southeast Telephone Inc. for Non-Payment and Southeast Telephone Inc. and Southeast Telephone Inc. v. BellSouth Telecommunications, Inc.*, Case Nos. 2005-00533 and 2005-00519 (consolidated), Order, 2006

271 rates have found that special access rates are not just and reasonable and have ordered the BOCs to charge other rates or have found that TELRIC rates apply unless the BOC can show that higher rates are just and reasonable.[240] In light of the significant disputes and uncertainty regarding the BOCs compliance with their 271 obligations it is unreasonable for the Commission

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Ky. PUC LEXIS 680 (Ky. P.S.C. Aug. 16, 2006), *appeal pending, BellSouth Telecomm., Inc. v. Kentucky Pub. Serv. Comm'n et al.*, 3:06-CV-00065-KKC (E.D. Ky.) (filed Sep. 12, 2006); *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, Order Part II (Me. P.U.C. Sep. 3, 2004), *aff'd, Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 441 F. Supp. 2d 147 (D. Me. 2006), *appeal pending, Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, No. 06-2151, (1st Cir. filed Jul. 19, 2006); *In the Matter, on the Commission's Own Motion, to Commence a Collaborative Proceeding to Monitor and Facilitate Implementation of Accessible Letters Issued by SBC Michigan and Verizon*, Case No. U-14447, Order, 2005 Mich. PUC LEXIS (Mich. P.S.C. Sep. 20, 2005), *appeal pending, Michigan Bell Tel. Co., d/b/a AT&T Michigan v. Covad Communications Company et al.*, No. 2:06-CV-11982 (E.D. Mich.) (filed Apr. 28, 2006); *In the Matter of a Potential Proceeding to Investigate the Wholesale Rates Charged by Qwest*, Docket No. P-421/CI-05-1996, Notice and Order for Hearing, 2006 PUC LEXIS 48 (Minn. P.U.C. May 4, 2006); *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement*, Case No. TO-2005-0336, Arbitration Order, 2005 Mo. PSC LEXIS 963 (Mo. P.S.C. July 11, 2005), *rev'd in part SBC Missouri v. Mo. Pub. Serv. Comm'n, et al.*, 2006 U.S. Dist. LEXIS 65536 (E.D. Mo. Sep. 14, 2006), appeal pending, No. 06-3726 (8th Cir. filed Oct. 17, 2006); *Proposed Revisions to Tariff NHPUC No. 84 (Statement of Generally Available Terms and Conditions); Petition for Declaratory Order re Line Sharing)*, Docket Nos. DT 03-201 and 04-176 (consolidated), Order No. 24,442, Order Following Brief, 2005 N.H. PUC LEXIS 24 (N.H. P.U.C. Mar. 11, 2005), *rev'd in part, Verizon New England, Inc. v. N.H. Pub. Utils. Comm'n*, No. 05-CV-94-PB (D. N.H. 2006), *appeal pending, New Hampshire Public Utilities Comm'n v. Verizon New England, Inc.*, No. 06-2429 (1st Cir. filed Sep. 21, 2006).

[240] *See, e.g., Generic Proceeding to Examine Issues Related to BellSouth Telecommunications, Inc.'s Obligations to Provide Unbundled Network Elements*, Docket No. 19341-U, Order Setting Rates Under Section 271, 2006 Ga. PUC LEXIS 21 (Ga. P.S.C. Mar. 8, 2006); Order on Reconsideration (Ga. P.S.C. Mar. 24, 2006); *VERIZON-MAINE Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21),* Docket No. 2002-682, Order at 8 (Me. P.U.C. Oct. 6, 2006).

to predicate forbearance from unbundling loops and transport on the availability of Section 271 elements.

Finally, Section 251(c)(4) resale cannot be relied on to provide wholesale access for competitors either. In 2000, the Eighth Circuit vacated and remanded the FCC's avoidable cost standard[241] that applied in determining the resale discount.[242] The Commission has yet to respond to the Eight Circuit's remand and its proceeding for gathering comments on how to modify the resale discount remains open.[243]

At bottom, for the Commission to entrust the viability of wholesale competition on special access, section 271(c) wholesale offerings, and section 251(c)(4) resale, is akin to saying wholesale competition is safe in a car with a cracked engine and radiator that leaks profusely, a grinding transmission, and bald tires with wheels that are barely attached. The car may be able to run but it won't go far. Indeed, the wholesale competitive industry would be placed in a perilous predicament if it had to rely on such a vehicle to develop and succeed. It would be arbitrary and capricious for the Commission to remove loop and transport unbundling in the six MSAs at issue, before it addresses the structural problems applicable to the ILECs' non-UNE wholesale offerings, *i.e.*, special access, Section 251(c)(4) resale, Section 271(c).

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[241] Under the FCC's vacated standard, avoided retail costs were those costs that an ILEC "would no longer incur if it were to cease retail operations and instead provide all of its services through resellers." *Local Competition Order*, ¶ 911.

[242] *Iowa Utilities Board v. FCC*, 219 F.3d 744, 754-56 (8th Cir. 2000) ("*Iowa II*").

[243] *See Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, WC Dkt. No. 03-173, Notice of Proposed Rulemaking, 18 FCC Rcd 18945, ¶¶ 141-146 (rel. Sept. 15, 2003).

4. Section 251(c)(3) loop and transport UNEs should not be subject to mass market forbearance if the record does not demonstrate that competitive loop alternatives are available

Nor is it appropriate to base forbearance on the availability of commercial arrangements when such arrangements incorporate access to TELRIC priced UNEs. In the *Omaha Order*, the Commission improperly relied on Qwest's Platform Plus ("QPP") offerings to justify its finding that Qwest's wholesale offerings would continue to be adequate to serve residential customers. The weight given to this evidence was unreasonable because QPPs are comprised of both a commercially priced element (the switchport) and a cost-based UNE loop purchased out of the CLEC's Section 251(c) interconnection agreement with Qwest. Therefore, QPPs are predicated on the availability of cost-based UNE loops and are not commercially negotiated non-UNE wholesale loop offerings, as the *Omaha Order* implies. Once the ILEC is relieved of its obligation to provide the TELRIC priced loop, the commercial offering disappears. The Commission erroneously ignored this evidence and, consequently, erred in relying on QPPs as evidence of Qwest offerings that would be available for CLECs seeking to serve the mass market without UNE loops.

Verizon claims that its Wholesale Advantage service, which is similar to the QPP, supports its request for forbearance from offering § 251(c)(3) loop and transport UNEs to the mass market. However, Verizon has not submitted any evidence that its purported commercial loop offering would be competitively priced.

However, for the reasons discussed, the Commission should not allow the shortcomings of its *Omaha Order* to reoccur and should deny Verizon's request for relief from its 251(c)(3) loop and transport unbundling obligations.

REDACTED FOR PUBLIC INSPECTION

VIII. CONCLUSION

For the forgoing reasons, the Commission should deny Verizon's request for forbearance from its obligation to provision § 251(c)(3) loop and transport UNEs throughout the six MSAs referenced in its Petitions.

Respectfully submitted,

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McLeodUSA Telecommunications Services, Inc.;
Mpower Communications Corp.;
Norlight Telecommunications, Inc.;
Penn Telecom, Inc.;
RCN Telecom Services, Inc.;
RNK Inc.;
segTEL, Inc.;
Talk America Holdings, Inc.;
TDS Metrocom, LLC; and
U.S. Telepacific Corp. d/b/a Telepacific Communications

March 5, 2007

EXHIBIT A

Table 1

State	Total ILEC Lines	Total CLEC Lines	ILEC % Residential	CLEC % Residential	Total ILEC Residential Lines	Total CLEC Residential Lines	ILEC Residential Market Share
Col.	A	B	C	D	E=AxC	F=BxD	E/(E+F)
MA	3,075,544	978,953	63%	39%	1,937,593	381,792	83%
NY	8,285,874	3,043,468	63%	44%	5,220,100	1,339,126	80%
PA	6,385,263	1,572,224	70%	25%	4,469,684	393,056	92%
RI	362,993	275,526	65%	60%	235,946	165,316	59%
VA	3,818,918	1,046,894	60%	47%	2,291,351	492,040	82%

Table 2

State	Total ILEC Lines	Total CLEC Lines	ILEC % Business (1-Res. %)	CLEC % Business (1-Res. %)	Total ILEC Business Lines	Total CLEC Business Lines	ILEC Business Market Share
Col.	A	B	C	D	E=AxC	F=BxD	E/(E+F)
MA	3,075,544	978,953	37%	61%	1,137,951	597,161	66%
NY	8,285,874	3,043,468	37%	56%	3,065,773	1,706,342	64%
PA	6,385,263	1,572,224	30%	75%	1,915,578	1,179,168	62%
RI	362,993	275,526	35%	40%	127,048	110,210	54%
VA	3,818,918	1,046,894	40%	53%	1,527,567	554,854	73%

EXHIBIT B

Letter from Chris MacFarland, Group Vice President - Chief Technology Officer, McLeodUSA, to Marlene Dortch, Secretary, FCC, WC Docket 05-281 (filed Dec. 15, 2006)

McLeodUSA

December 15, 2006

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
Washington, DC 20554

Re: Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage LEC Study Area, WC Docket No. 05-281

Dear Ms. Dortch:

It is the understanding of McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") that some Commissioners view the Commission's grant of forbearance in the Omaha, Nebraska market as a template to follow in the current forbearance proceeding based on the notion that it proves that forbearance can result in a viable model of competition.[1] As the most impacted competitive local exchange carrier in the Omaha market, McLeodUSA wants to make it clear in this proceeding that the forbearance granted by the FCC in the Omaha market has made it extremely difficult for McLeodUSA to remain in the Omaha market and has severely devalued the investment in our network facilities in that market. Barring relief from the appellate court in the appeal of the *Omaha Forbearance Order*, McLeodUSA will either sell or cease it operations in the Omaha market, despite its enormous investment in its own network facilities.

In the *Omaha Forbearance Order*, the Commission made a predictive judgment that, notwithstanding forbearance from UNE obligations, Qwest would continue to make wholesale offerings of loops and transport to its competitors, based in part on the fact that Qwest had entered into some commercial agreements with UNE-P providers.[2] Consistent with the

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[1] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Sec. 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, FCC 05-170, WC Docket No. 04-223, released December 2, 2005 ("*Omaha Forbearance Order*"), *appeal pending*, *Qwest v. FCC*, Case No. 05-1450 (DC Circuit).

[2] *Omaha Forbearance Order* at ¶ 82. McLeodUSA, as noted in other filing, has entered into a QPP with Qwest which it uses to provide 144 alarm circuits in Omaha. McLeodUSA has not found that pricing under the QPP permits it to provision new customers.

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information McLeodUSA provided in earlier filings in the Omaha proceeding,[3] Qwest continues to steadfastly refuse to negotiate any commercial or Section 271 pricing for the delisted high capacity UNEs for the affected central offices ("COs"). Instead, Qwest's has only offered tariffed special access and tariffed discounts on special access pricing as a replacement for the delisted high capacity UNEs. The Commission's prediction that Qwest would negotiate a fair price with McLeodUSA outside the umbrella of regulation was patently incorrect.

It is also noteworthy that McLeodUSA has approached Cox Communications on at least two occasions regarding its willingness to entertain a commercial arrangement for McLeodUSA to lease from Cox last mile network facilities. McLeodUSA was rebuffed on both occasions.

Thus, McLeodUSA's only option has been to replace delisted high capacity UNE loops and transport by leasing such facilities from Qwest at special access pricing. An especially egregious component of Qwest's special access pricing are the exorbitant non-recurring charges ("NRCs"). Qwest charges $618.25 to install each high capacity circuit. The $618.25 NRC compares to a $124.61 NRC for a comparable DS1 UNE. By itself, the special access NRC is a significant market barrier for acquiring new enterprise business customers. In addition, the forbearance enabled Qwest to increase the monthly recurring charge for high capacity loops from $76.42 to $202.22. By forcing McLeodUSA to special access pricing, Qwest has been able to relegate McLeodUSA to essentially being a CAP provider in the Omaha market, forcing it to target its limited sales efforts to large and very large business customers. Relegating a competitive provider that has invested tens of millions of its own capital in operating its own local network infrastructure to a CAP provider is certainly not the model of facilities-based competition that McLeodUSA believes was envisioned by the 1996 Telecommunications Act.

Once it became clear that Qwest was unwilling to negotiate what the Commission had predicted would be reasonable commercial or Section 271 pricing, McLeodUSA made several strategic decisions with respect to the Omaha market. First, McLeodUSA removed most of the employees from the market and attempted only to service our existing customer base and sell enough to minimize churn, and maintain the *status quo* pending appeal of the *Omaha Forbearance Order*. Second, McLeodUSA ceased all sales for residential and business POTs service in the Omaha market. At this time, McLeodUSA is not selling services less than a DS1 level offering unless the customer requests POTs as an ancillary service. McLeodUSA has forecasted net customer loss in the Omaha market in 2007 and beyond since the market is not economically viable in light of Qwest's special access rates.

Thus, while the Commission's analysis in its *Omaha Forbearance Order* appeared to rely on the existence of McLeodUSA as an established competitive provider to bolster its predictive judgment that competition would continue after forbearance was granted, the Commission cannot reach the same conclusion in this proceeding. Experience over the past year has shown the Commission's predictions to be mistaken. The reality is that established or not, a competitive provider cannot survive if the incumbent local exchange carrier is permitted to set

[3] Motion for Stay, McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223, filed February 3, 2006, p. 11; Letter to Marlene H. Dortch from William A. Haas, Associate General Counsel, McLeodUSA Telecommunications Services, Inc., WC 04-223, filed September 14, 2005, p. 3.

wholesale prices for bottleneck last mile and transport facilities without some reasonable measure of regulatory supervision of that wholesale pricing.

In addition to severely limiting McLeodUSA's ability to effectively compete in most customer segments in the Omaha market, the *Omaha Forbearance* Order has significantly devalued McLeodUSA's network assets in the Omaha market. McLeodUSA has been consolidating its operations in the past twelve months, and while its assets have been valued by suitors at reasonable prices in other states such as North Dakota and South Dakota, no parties have shown any interest in the Omaha market due to the FCC's forbearance decision. The *Omaha Forbearance Order* has deterred all investment in Omaha except for the incumbent and Cox. Thus, the result of the *Omaha Forbearance Order* will be a duopoly between the incumbent cable provider and the ILEC in the small, medium and enterprise business market segment, and to the extent mobile phones are not considered a substitute by some segment of residential customers, the residential market as well. Such a limited version of facilities-based competition is not the result that McLeodUSA believes Congress intended in the Telecommunications Act of 1996.

As previously noted, barring court relief in the appeal of the *Omaha Forbearance Order*, McLeodUSA will either sell or cease its operations in the Omaha market, despite its enormous investment there in its own network facilities.

For all the reasons previously advanced by McLeodUSA, the Commission should deny the forbearance in this docket.

Sincerely,

/s/

Chris MacFarland
Group Vice President - Chief Technology Officer

Cc: Dan Gonzalez
Michelle Carey
Russell Hanser
Scott Deutchman
Scott Bergmann
Thomas Navin
Ian Dillner
Julie Veach
Jeremy Miller
Tim Stelzig

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